(37,476)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY, APPELLANT,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, Oscar Vest, and T. H. Lauhon, Members Constituting said Railroad Commission; J. W. Cammack, Attorney General of the Commonwealth of Kentucky; City of Lexington, a Municipal Corporation, and S. B. Featherstone, Individually and as Representing All Other Persons Similarly Situated

BILL OF COMPLAINT—Filed Oct. 19, 1929

To the Honorable A. M. J. Cochran, Judge of the District Court of the United States for the Eastern District of Kentucky:

The Central Kentucky Natural Gas Company, the plaintiff, a Corporation, brings this its Bill of Complaint against the Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon members of and constituting the said railroad commission, J. W. Cammack, Attorney General of the Commonwealth of Kentucky, the City of Lexington, a municipal corporation, and S. B. Featherstone, who is made defendant on his own behalf and on behalf of all other consumers of natural gas similarly situated; and for its cause of action the plaintiff complains and alleges as hereinafter set out.

I

The plaintiff, Central Kentucky Natural Gas Company, is a corporation created and existing under the laws of the Commonwealth of Kentucky, with its principal office in the City of Lexington, Kentucky, in the Eastern District of this State, to which said district all of its operations are confined and in which all of its property is located.

The defendant, Railroad Commission, is a body created and existing under the Constitution and Statutes of the Commonwealth of Kentucky and maintains its office at the seat of Government in the City of Frankfort, which is in the Eastern District of the Commonwealth of Kentucky. The defendants, Moses R. Glenn, Oscar Vest and T. H. [fol. 2] Lauhon constitute said Railroad Commission and are the duly elected, qualified and acting members thereof. Each of said three members is a citizen of the State of Kentucky. The said Moses R. Glenn is a resident of Dawson Springs, Christian County, in the Western District of said State; Oscar Vest is a resident of Carrollton, Carroll County, in the Eastern District of said State; T. H. Lauhon is a resident of Ashland, Boyd County, in the Eastern District of said State. The defendant, J. W. Cammack is a citizen and resident of the State of Kentucky and is the duly elected, qualified and acting Attorney General, and is a resident of Frankfort, Kentucky, in the Eastern District of said State. The City of Lexington is a municipal corporation, created under the laws of the State of Kentucky, and is a city of the second class, and is situated in the Eastern District of Kentucky. The defendant, S. B. Featherstone is a citizen and resident of the State of Kentucky, and is a resident of the City of Lexington, Fayette County, in the Eastern District of said State.

II

This action is of a civil nature in equity and is brought for the purpose of enjoining the enforcement of an Order of said Railroad Commission, dated October 9, 1929, prescribing the rates to be charged by plaintiff for natural gas service furnished the inhabitants of Lexington, Kentucky. It arises under the Constitution and the laws of the United States, particularly under the Fourteenth Amendment to said Constitution, in that the rate prescribed is unjust, discriminatory and confiscatory of plaintiff's property.

The amount in controversy is in excess of $3,000.00, exclusive of interest and costs.

[fol. 3] III

This suit involves the right of the plaintiff to have established and fixed for rate making purposes the fair and rea-

sonable value of its property, devoted to public use, and the determination of a fair and reasonable return upon said value. Plaintiff avers that the said order does not properly and legally give consideration to the present value of its property in accordance with the competent evidence of such value presented to the defendant, Railroad Commission, and is confiscatory of its property used and useful in furnishing gas service to the public; that said order deprives plaintiff of its property without due process of law and denies plaintiff the equal protection of the laws, in violation of its rights under the Fourteenth Amendment to the Constitution of the United States, and is therefore null and void. Said order is in violation of the rights of the plaintiff under Section 13 of the Constitution of the Commonwealth of Kentucky, in that same would result in the taking of plaintiff's property without just compensation therefor.

IV

Plaintiff says that on or about September 5, 1905, it purchased a natural gas franchise from the City of Lexington, Kentucky, said franchise having been offered for sale and purchased by the plaintiff in due conformity with the laws of the Commonwealth of Kentucky. The plaintiff, under the terms of said franchise, furnished and sold natural gas to consumers thereof in the City of Lexington until the expiration of said franchise, which occurred on or about the 5th day of September, 1925. Plaintiff says that prior to the expiration of said franchise it entered into negotiations with said City for a new franchise, and said negotiations continued up to January 28, 1927, on which date the Com- [fol. 4] missioners for the City of Lexington duly passed and adopted an ordinance, hereinafter sometimes referred to as the "Franchise Ordinance", under which the sale of a franchise was authorized and directed to be made; that thereafter said franchise was offered for sale at public auction, and the bid of plaintiff therefor was accepted subject to its further approval and acceptance by the Commissioners for the City of Lexington, that thereafter said Commissioners for the City of Lexington duly adopted an ordinance accepting the bid of the plaintiff for said franchise; that said ordinance was published and became a law on the 25th day of February, 1927, and by virtue of said ordinance

a contract was effected and completed between the plaintiff and the City of Lexington, under which the plaintiff acquired a new franchise under said franchise ordinance, and the effective date of said franchise contract was and is February 25th, 1927.

Plaintiff says that under the terms of said franchise contract all matters pertaining to the rights and obligations of the plaintiff in furnishing and selling natural gas thereunder to the consumers thereof in the City of Lexington were agreed to, except that the rates, charges and compensation to be charged by the plaintiff for its natural gas service were not specifically agreed upon in said franchise contract, but said ordinance provided in Section 4 (A) thereof that the plaintiff Company should have the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges and compensation. Plaintiff says that under sub-section (B) of said Section 4 it was provided that plaintiff should within two days after the effective date of said franchise contract promulgate in writing the rates, charges and compensation which it should deem to be just and reasonable, and which it proposed to charge for its gas service, and to file a copy [fol. 5] thereof with the Mayor of the City of Lexington, and a copy thereof, together with a copy of said franchise ordinance, with the Railroad Commission for the State of Kentucky. Plaintiff says that pursuant to the provisions of said Section it did within two days after the effective date of said franchise contract, to-wit, on February 26, 1927, promulgate in writing the rates, charges and compensation which it then deemed to be just and reasonable and which it proposed to charge for its gas service, and filed a copy thereof with the Mayor of the City of Lexington, and a copy with the Railroad Commission for the State of Kentucky. Plaintiff says that sub-section (D) of said Section 4 of said franchise ordinance provided, that in the event the rates and charges promulgated as aforesaid by the Company, plaintiff, should, in the opinion of the said City of Lexington, be in excess of just and reasonable rates and charges, then said City should proceed before the railroad commission for the State of Kentucky, as provided in Sections 201e-1 to 201e-20, of the Kentucky Statutes. Plaintiff says that the City of Lexington did proceed before the said railroad commission by filing with said com-

mission its complaint to said rates and charges, and averred therein that said rates and charges were excessive and extortionate; that said complaint was filed on behalf of the City of Lexington, and by S. B. Featherstone for themselves and all other consumers of natural gas in the City of Lexington as complainants against Central Kentucky Natural Gas Company as defendant. Plaintiff says that said complaint was duly heard by said railroad commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants and this Company, and said case was submitted on the pleadings, proof and exhibits introduced by the parties thereto, on or about the — day of July, 1929, and written briefs were thereafter filed by the respective parties, and [fol. 6] plaintiff states that thereafter it received by mail from the defendant, Oscar Vest, a copy of a letter bearing date October 1, 1929, addressed and sent by said defendant Oscar Vest to the Hon. Robert H. Winn, of Counsel for the City of Lexington, in said proceeding, stating that said Commission had fixed a rate of 45 cents for natural gas at Lexington as a flat rate, and requesting therein that the attorneys for the City of Lexington prepare an order in accordance therewith. Plaintiff says that thereafter, to-wit, on the 9th of October, 1929, and prior to the making of an entry of any order by said Commission fixing the rate aforesaid and herein complained of, the plaintiff filed before said Commission its certain motions in writing, wherein the plaintiff requested said Commission to ascertain, find and set out in its order, and preliminary and prior to the fixing of any rate or charge for its gas service at Lexington, and showing and establishing the necessary basis for the fixing of any such rate or charge, certain facts including among others the value of the plaintiff's properties, both in the aggregate and separately, as to the various units thereof, used and useful in rendering said gas service to the consumers thereof in the City of Lexington, which said motions were and are in full as follows, to-wit:

BEFORE THE RAILROAD COMMISSION OF THE STATE OF KENTUCKY

CITY OF LEXINGTON and S. B. FEATHERSTONE, Complainants,

vs.

CENTRAL KENTUCKY NATURAL GAS COMPANY, Defendant

Motions Made on Behalf of the Defendant

Now comes the defendant, Central Kentucky Natural Gas Company, and states that it received in due course of [fol. 7] mail a copy of the letter of Commissioner Oscar Vest addressed to Hon. Robert H. Winn under date of October 1, 1929, and reading as follows, to-wit:

"Kentucky Railroad Commission, Frankfort

October 1, 1929.

Hon. Robert H. Winn, Mt. Sterling, Kentucky.

DEAR SIR: Upon consideration of the proof and the brief, the Commission has fixed a rate of forty-five cents for natural gas at Lexington. This is to be a flat rate.

The Attorneys for the City of Lexington will prepare an order accordingly.

We desire the order to reserve the question of the money impounded in John Carter's hands as receiver until we have considered it, and have asked the views of the attorneys about it, if we decide to have a hearing on the subject.

Very truly yours, Oscar Vest."

This defendant now moves the Commission as hereinafter specifically set out.

1. This defendant moves the Commission to rule on all motions hereinbefore made before the Commission and not heretofore disposed of, and more specifically, to rule on the objections and exceptions to the testimony of John T. Kimball and Harrison Smith filed herein by the Complainants on or about September 11, 1929, and to enter an order herein stating the rulings of the Commission thereon.

2. This defendant states that any rate or charge, which may be fixed or ordered by the Commission as a just and reasonable charge which this defendant may be permitted or ordered to make and collect for its gas service, must [fol. 8] necessarily be based on the value of the defendant's property used and useful in rendering said service as ascertained and fixed by this Commission, and on which the Commission shall hold that this defendant is entitled to a reasonable return; also on the rate of return as ascertained and found by the Commission to be a reasonable and sufficient rate of return; also on the percent of property values or amounts ascertained and allowed by the Commission as reasonable and sufficient for purposes of amortization, depletion, maintenance, and for contingencies; also on the amount as ascertained and estimated by the Commission, which should be allowed as reasonable for operating expenses; also on the amount as ascertained and estimated by the Commission which shall be produced as gross revenue to the defendant under such rate as the Commission may fix and order, and which shall be available for operating expenses, for amortization, for depletion, for maintenance, for contingencies, and for a return to this defendant on the ascertained value of its entire property, and on the ascertained value of its property allocable to the Lexington District.

This defendant says that it is entitled to have the Commission ascertain and determine each and all of said matters by an order entered herein prior to, or as preliminary to and part of an order entered by the Commission fixing and ordering the rate or charge which this defendant shall be permitted to collect for its gas service; and to the end that these things shall be done and made a matter of record herein, this defendant now moves the Commission specifically as hereinafter set out in the severally numbered paragraphs hereto following:

3. This defendant moves the Commission to specifically find and state by its order as to whether it holds that the value of the property owned by the Lexington Utilities Company, known as the Lexington Distribution System, [fol. 9] and used in the service rendered by the defendant, should be included with the value of this defendant's property as part of the total value of the property on which a reasonable return should be predicated, disregarding and

omitting the rental paid by the defendant to the Lexington Utilities Company as an operating expense for the use of said property; or whether the value of said property of the Lexington Utilities Company should be excluded from the rate base, and said rental treated as an operating expense.

4. If the Commission shall hold and order that the value of said property of the Lexington Utilities Company should be included in and as a part of the rate base, then this defendant further moves the Commission to specifically find and state separately by its order the value which the Commission places on said property and the value at which it should be included as a part of the rate base.

5. This defendant further moves the Commission to specifically find and state by its order entered herein the total value which the Commission places on the property of the defendants used and useful in rendering its gas service, and on which the Commission shall hold that the defendant is entitled to earn a return; and this defendant further moves the Commission to find and state separately by its order entered herein, the value which the Commission places on the separate units or integral portions of the defendant's property as shown by the inventories and valuations of said property testified to by the witnesses herein, and as follows, to-wit:

(a) That the Commission state separately the value which it places on the Production System properties owned by the defendant and consisting of the Menifee Field property and the Red Bush Field property; and this defendant further moves the Commission to specifically state the value which the Commission places on or assigns to the [fol. 10] Menifee Leaseholds, including the gas contained therein, and also what value, if any, the Commission assigns to said Menifee leaseholds as a reservoir, or container, for storage purposes over and above the value assigned to said Menifee leaseholds as a production property.

(b) That the Commission state separately the value which it places on the several units of property owned by the defendant, constituting its transmission system, and more particularly designated and described in the inven-

tory and valuation made by Ford, Bacon & Davis, and filed herein, and testified to by the witness, John T. Kimball, and designated as Company Exhibit No. 1, and as follows, to-wit:

(1) The Menifee Compressing Station.
(2) The Red Bush Compressing Station.
(3) The Main line from Inez to Lexington.
(4) The Red Bush Branch line.
(5) The Johnson-Magoffin Branch line.
(6) The Mt. Sterling Branch line.
(7) The Paris Branch line.
(8) The Sitka Branch line.
(9) The Kentucky Cities Branch line.
(10) The Telephone line.

(c) That the Commission state separately the value which it places on the several units of property owned by defendant and constituting its distribution system property, and specifically set out on the aforesaid Exhibit as follows:

(1) The Lexington Urban distribution property owned by Central Kentucky Natural Gas Company.
(2) The Winchester Distribution property.
(3) The Mt. Sterling Distribution property.

(d) That the Commission state separately the value which it places on the property designated in the aforesaid Exhibit as "General Property", consisting of office furniture and fixtures.

[fol. 11] (e) That the Commission find and state by its order what amount, or amounts, if any, are assigned by the Commission to the values placed by the Commission on the defendant's property aforesaid, both in the aggregate and in detail as hereinbefore set out, for or on account of Construction Overheads and specifically as follows:

(1) Engineering during construction.
(2) Legal expenses during construction.
(3) Administration expenses during construction.
(4) Taxes, insurance and damages during construction.
(5) Interest during construction.

(f) That the Commission find and state separately by its order entered herein what, if any, amount is allowed or included by the Commission in the valuation of the defend-

ant's property for or on account of organization and promotion expense.

(g) That the Commission find and state separately by its order entered herein, what amount, if any, is allowed and included by the Commis-ion in the valuation of the defendant's property for or on account of Cost and Financing.

(h) That the Commission find and state separately by its order entered herein, what amount, if any, is allowed or included by the Commission in the valuation of the defendant's property for or on account of the following two items:

(1) Going concern value.
(2) Cost of obtaining new franchise.

(i) That the Commission find and state separately by its order entered herein what amount, if any, is allowed or included by the Commission in the value placed by the Commission on the defendant's property for or on account of working capital, consisting of the following two items, to-wit:

[fol. 12] (1) Material and supplies.
(2) Cash required for operation.

(j) That the Commission ascertain and find and state by its order the aggregate gross revenue which shall be estimated by the Commission the defendant will receive under the rate or charge, which shall be fixed and ordered by the Commission; that the Commission further ascertain and find and state by its order specifically as follows, to-wit:

(1) The operating expenses of the defendant as estimated by the Commission.

(2) Whether, in determining the estimated operating expenses, the Commission holds that the gas purchased by the defendant, in excess of the gas purchased from the Petroleum Exploration Company, should be included as an operating expense at a flat rate per thousand cubic feet, and if so, at what rate.

(k) That the Commission shall determine and state by its order as to whether, in determining the cost of purchased gas by the defendant under its various purchase contracts, as an operating expense, the prices agreed to be paid by the defendant under said purchase contracts, should be disre-

garded and said contracts ignored, including the contract between the defendant and United Fuel Gas Company.

(l) As to whether, in determining the amount which should be paid by the defendant to the Lexington Utilities Company as rental, the sum of $10,000.00 should be deducted from the rental paid by the defendant, and as contended by the complainants should be deducted.

(m) What amount or amounts, if any, the Commission holds should be allowed out of gross revenue as necessary for amortization, depletion, extraordinary maintenance and contingencies both in the aggregate and separately.

[fol. 13] (n) The rate of return which the Commission shall hold should be allowed to the defendant as reasonable and sufficient.

(o) That the Commission state separately by its order entered herein what, if any amount for cost of cutting and replacing pavement over the existing mains or pipe lines used in the distribution of gas to consumers in the Lexington district and the Commission shall hold should be allowed and included in the value of the defendant's property or of the property of the Lexington Utilities Company as the same shall be fixed by the Commission.

D. L. Hazelrigg, Chester J. Gerkin, Allen, Botts & Duncan, Attorneys for Central Kentucky Natural Gas Company.

Plaintiff further says that said Commission thereupon the same day overruled said motions and refused to make any findings of fact as requested in said motions, and the said order of said Commission which is herein complained of, overruling said motions was and is as follows:

"Before the Railroad Commission of the State of Kentucky

City of Lexington and S. B. Featherstone, Complainants,

vs.

Central Kentucky Natural Gas Company, Defendant

Order

This day came the defendant and filed herein certain motions, to the granting of which the complainants objected,

[fol. 14] and the same being heard, it is now ordered that each and all of said motions be and the same now are overruled, to which ruling the defendant objects and excepts."

Plaintiff says that thereupon and on the same day, to-wit, October 9th, 1929, the said Commission entered the order which, among other things, fixed the rate herein complained of, and said order which is herein complained of was and is as follows:

IN THE RAILROAD COMMISSION OF KENTUCKY

CITY OF LEXINGTON et al., Complainants,

vs.

CENTRAL KENTUCKY NATURAL GAS COMPANY, Defendant

ORDER—Entered Oct. 9, 1929

This cause which involves the fixation of just and reasonable rates for the sale of natural gas by the Central Kentucky Natural Gas Company in the City of Lexington, Kentucky, and whether the charges and rates set up by said Company in its schedules, on file with the Commission, for the sale of such gas in said City are, upon the one hand, extortionate, or, upon the other hand are just and reasonable, coming on to be heard upon the pleadings, evidence, exhibits, and briefs and arguments of counsel for both sides, and the Commission being sufficiently advised, adjudges and orders as follows, to-wit:

[fol. 15] First. That the rates and charges for natural gas as set up in defendant's schedule therefor, on file with the Commission, and for which it has contended in the said hearing, are each and all unreasonable and extortionate.

Second. That a flat rate and charge (which shall not be increased by any other charge or device of any kind or description) of forty-five (45¢) cents per one thousand cubic feet for the gas sold by said Central Kentucky Natural Gas Company to its customers under its Lexington, Kentucky, franchise is a fair and reasonable rate and charge therefor, which rate and charge shall be and is the lawful and valid rate and charge therefor effective from and after January 28th, 1927, (the effective date of said franchise)

and until such charge or rate may be otherwise fixed by law or by the agreement of parties.

Third. That defendant Company has the right, in addition to said forty-five cents per thousand cubic feet, to charge to and collect from any customer or customers three (3¢) cents per thousand cubic feet for any gas not paid for within ten (10) days after bill therefor is mailed or delivered to such customer or customers.

Fourth. That the Central Kentucky Natural Gas Company filed herein, at the inception of this hearing and controversy, a copy of its ordinance-franchise whereunder it is operating in the City of Lexington; that said franchise-contract made certain stipulations and provisions about the fixation of rates under it, and that the Commission had conformed its procedure as near as might be to the agreements of the said franchise-contract. That it is provided in Section 4 (E) of said franchise-contract that pending the final determination of just and reasonable rates and charges by this Commission and including any subsequent proceedings in Court, the defendant Company shall have [fol. 16] the right to charge not to exceed sixty (60) cents per thousand cubic feet for its gas; and that in order to afford either side hereto the right, if it be so desired, to proceed in the courts with respect to such fixation of rates, the application of the forty-five cent rate hereby fixed is suspended for a period of thirty (30) days from the entry of this order; that if within said thirty day period either side shall have filed such proceeding in court, then the application of the forty-five cent rate hereby fixed shall be suspended until there by a final fixation in court of said rates, and subject to such modification, if any, of said rate as may be fixed by said Court or Courts; but that if no such proceeding be filed in said time, then the said forty-five cent rate shall at once be put into force and effect.

That it be specifically recited and reserved, however, that no such suspension of the application of said forty-five cent rate shall affect the fact that it, or it as modified by the Courts, shall be effective from said 28th day of January, 1927.

Fifth. That as appears of record herein there have been impounded under the control and orders of the Commis-

sion, as provided in Section 4 (E) of said franchise, considerable sums of money out of the collections made by defendant Company as under the temporary rates by said section provided, which sums of money are to be distributed as under the orders of the Commission and as under the orders of the courts, to which this controversy may be taken by the parties thereto. In consideration thereof it is ordered:

(a) That John H. Carter as Special Receiver do file within thirty days from this date a full report of all sums received by him, the dates of his such receipts, the expenses [fol. 17] and allowances incident thereto, how said funds are now held and invested, and the net amount thereof in his hands as such Receiver.

(b) That upon the motion of plaintiff said defendant company is ordered, within thirty days from this date, to file with this Commission a full and detailed statement and exhibit of the names of each and all customers who have contributed to said funds, and the time and amounts of their several contributions thereto.

(c) That if there be instituted as within thirty days named in section four hereof, by either party, any suit to further try the rate controversy which is the subject of this proceeding, that the said impounded funds be retained in the custody and control of this commission, and not distributed until said Court proceedings have been fully determined but that if said proceeding be not instituted in said thirty days, that this Commission will proceed to the distribution of said funds as may be proper in the premises.

That it be specifically reserved and recited, however, that nothing herein shall affect the right and obligation of the Commission to finally pay out said funds as under its fixation of rates herein made, or as same may be modified by the courts, and as is provided in said franchise-contract.

Sixth. That if either party hereto shall institute the proceedings in court named in sections four and five hereof, said party will at the same time file with this Commission, and deliver to the opposing side, a copy of the pleadings by which such proceedings are taken and a statement of the date upon which same are filed."

A copy of the aforesaid franchise ordinance marked for identification Exhibit "A" is filed herewith as a part hereof.

Plaintiff also files herewith as part hereof a true copy of Sections 201e-1 to 201e-26 both inclusive of the Statutes of [fol. 18] the State of Kentucky, Carroll's Sixth Edition thereof, marked Exhibit "B".

VI

Plaintiff says that under and by its order aforesaid, said Commission fixed and ordered a rate of 45 cents per thousand cubic feet as a just and reasonable rate for the natural gas service of the plaintiff to consumers of natural gas in the said City of Lexington, and plaintiff says that said rate of 45 cents is less than a just and reasonable rate and is confiscatory as herein shown, and the enforcement thereof against the plaintiff would be in violation of the plaintiff's rights under and as prescribed by the Fourteenth Amendment to the Constitution of the United States, in that said rate and its enforcement would deprive the plaintiff of its property without due process of law, would constitute a denial to the plaintiff of equal protection of the law, and said rate is and its enforcement would also be in violation of the plaintiff's rights under Section 13 of the Constitution of the State of Kentucky, in that said rate and its enforcement would deprive the plaintiff of its property without just compensation.

VII

Plaintiff states that for a number of years last past it has been and is now engaged in the business of mining for, producing, selling, marketing and distributing to the purchasers and consumers thereof natural gas, the said business of plaintiff being the furnishing of natural gas to consumers residing in and immediately adjacent to the City of Lexington, known as the Lexington District, also to consumers residing in and immediately adjacent to the City of Mt. Sterling, known as the Mt. Sterling District, also to consumers residing in and immediately adjacent to the City of Winchester known as the Winchester District, and [fol. 19] in addition thereto the furnishing of gas to certain wholesale consumers. For such purpose the plaintiff owns

and holds lands, leasehold estates, pipe lines, compressor stations, tools, machinery and other equipment necessary for the conduct of such business and useful for such purposes, and that all of its said property so owned is located in the State of Kentucky and in the Eastern District thereof. Plaintiff further says that in addition to its own property aforesaid used and useful in rendering said gas service the plaintiff has at all times aforesaid used and now uses the plant or distribution system located within the corporate limits of the City of Lexington and owned by the Lexington Utilities Company, which said property is used and useful in rendering said gas service in the City of Lexington, and said property so owned by the Lexington Utilities Company consists of pipe lines, meters, regulators and other physical property. Plaintiff says that the fair and reasonable value of the properties used and useful in furnishing said gas service and owned by the plaintiff, after making all due allowance and deductions for existing depreciation in the physical property, was not less than $5,610,829.00, as of December 31st, 1926, (the date certain in this case), and is substantially higher than said amount at the present time; and plaintiff further says that the fair and reasonable value of the property leased by it as aforesaid and owned by the Lexington Utilities Company and used and useful in furnishing said gas service to consumers in Lexington, after making all due allowances and deductions for depreciation in the physical property, was not less than $730,069.00 as of the date aforesaid, and is substantially higher at the present time. And plaintiff says that the total fair and reasonable value of the combined properties [fol. 20] aforesaid owned and leased by the plaintiff as aforesaid, used and useful in furnishing said gas service, after making all due allowances and deductions for existing depreciation of the physical property was not less than $6,340,895.00 as of December 31, 1926 (being the date certain in this case), and is substantially higher than said amount at the present time.

Plaintiff further states that the said entire property used and useful in said gas service may for convenience and should be divided into two classifications, physical or tangible, and intangible. The physical or tangible properties may and should be divided into (a) the production

system, which includes the property used in producing the gas and delivering it to the pipe lines of the Company to be conveyed to market; and (b) the transmission system, which includes the pipe lines and compressor stations used in transmitting the gas for delivery to the distribution systems in the several towns and cities where it is engaged in the public service business as well as to the wholesale consumers; (c) the distribution system, which includes the value of the plants, including street mains, meters and all other machinery and devices used by the Company in delivering the gas after it reaches the city limits to the consumers; (d) and general property, which includes the office furniture and equipment; the general overheads, or undistributed Construction Expenditures, which are made up of, (1) organization cost, and (2) construction overheads, which latter consist of (a) Engineering during Construction, (b) Legal Expense during Construction, (c) Administration during Construction, (d) Insurance and Damage during Construction, none of which are included in the cost of Labor and materials going into the plant, but are a part [fol. 21] of the total cost of the constructed plant; (3) cost of financing, which is the cost of the service for assembling the necessary capital to construct the plant; (4) working capital, which is made up of, (a) Materials and Supplies, which include materials and supplies necessary to have on hand in the operation of the Company, and (b) Cash necessary for carrying on the business.

The intangible properties may be and should be divided into (a) going concern value—that is, the element of value or property in an assembled and established plant doing business and earning money upon which the owner has the right to make a fair return; and (b) Cost of Obtaining New Franchises, which is the actual cost expended by the Company in procuring its franchises under which it is permitted to operate within municipalities.

Plaintiff states that the aforesaid items and the fair and reasonable value thereof, and which constitute the aforesaid entire combined properties of plaintiff and said Lexington Utilities Company, used and useful in said gas service, and that portion properly allocated to the Lexington District and used and useful in said Lexington District, were as of December 31, 1926, as follows:

[fol. 22] Properties of the Central Kentucky Natural Gas Company

	Entire system	Portion allocated to Lexington District
1. Production system properties	$2,350,064	$1,325,899
2. Transportation system properties	1,594,556	694,060
3. Distribution system properties	262,295	83,754
4. General properties	1,509	852
Total fair value of physical properties of the Central Kentucky Natural Gas Company as of December 31, 1926	$4,208,439	$2,304,565
General Overheads:		
5. Construction overheads	426,515	229,395
6. Organization costs	101,600	57,323
7. Cost of financing	146,028	79,093
Total General Overheads	$674,143	$365,811
Intangible Capital:		
8. Going Concern Value	$488,257	$304,867
9. Cost of buying new franchise	100,000	73,410
Total Intangible Capital	$588,257	$378,277
Working Capital:		
10. Materials and Supplies	$6,551	$4,563
11. Cash required for operations	133,449	78,468
Total Working Capital	$140,000	$83,031
Total fair and reasonable value of entire properties of Central Kentucky Natural Gas Company, used and useful in furnishing its gas service	$5,610,829	$3,131,684

Properties Owned by Lexington Utilities Company

	Entire system	Portion allocated to Lexington District
1. Distribution System	$600,008	$600,008
2. Construction Overheads	77,614	77,614
3. Organization Cost	26,650	26,650
4. Total Cost of Financing	25,797	25,797
Total fair value of properties of Lexington Utilities Company as of December 31, 1926	$730,069	$730,069
Total fair and reasonable value of property of Central Kentucky Natural Gas Company used and useful in furnishing its gas service including the property of Lexington Utilities Company used and useful in furnishing said gas service as of December 31, 1926	$6,340,898	$3,861,753

[fol. 23] Plaintiff avers (and it is common knowledge) that the business of mining for, producing, selling, marketing and distributing natural gas is one of exceptional

hazard, and that the subject matter of the investment therein is exhausted in its use within a comparatively short period of time, and by reason thereof the investment in and the acquisition and development of natural gas lands, and in the facilities for the transportation of natural gas to points of consumption must be amortized within the life of the producing fields from which natural gas is or may be obtained, and such necessity for amortization exists alike where the producing fields are owned by the distributing company or are owned by other producers from whom gas is purchased by the distributing company for sale and distribution. Plaintiff says that a rate of return upon the value of the property of such distributing company, used and useful in the public service, which fails of does not take into account the factors aforesaid is unjust, unreasonable and confiscatory.

Plaintiff further states that under a rate of 45 cents for gas at Lexington its gross earnings for the year 1926 would have been $1,003,952 for its entire system and $598,777 for the Lexington District; that its operating expenses for said year would have been $767,235, for its entire system; and $448,655 for the Lexington District; that the net earnings for said year, after paying operating expenses, but without making any allowance whatever for taxes, would have been $236,715 for the entire system and $150,122 for the Lexington District. That said accounts would be insufficient for depletion, depreciation, amortization, extraordinary maintenance and a reasonable allowance for con- [fol. 24] tingencies, both for the entire system nad for the Lexington District, and would leave nothing for a return on plaintiff's property used and useful in rendering said service, either for the entire system or for the Lexington District, and plaintiff states that under said 45 cent rate it would be compelled to furnish said gas service at an actual loss, both for its entire system and for the Lexington District, and the same would be true for the years 1927 and 1928, that under said 45 cent rate at Lexington the revenue available for said purposes would have been less in 1927, and in 1928 than they were in 1926, as based on actual operations.

VIII

Plaintiff states that prior and subsequent to the purchase by it of its present franchise from the City of Lexington, it was contended by the City of Lexington that the rental paid by the plaintiff to the Lexington Utilities Company for the use of the distribution system owned by said Company was in excess of a fair return upon the fair value of said property, and that in determining the rates and charges for service in Lexington said lease agreement should be disregarded and the rental paid thereunder omitted and left out of consideration as an operating expense, but the fair value of the property owned by the Lexington Utilities Company should be added to the fair value of the property owned by the plaintiff and properly allocated to the City of Lexington, for the purpose of arriving at and determining the total fair value of the property used and useful in rendering said service in Lexington, and that such total fair value should be adopted and considered as the rate base upon which the plaintiff should be allowed a fair return. Plaintiff says that by reason [fol. 25] of said contention it caused to be made an inventory and valuation of the said property of the Lexington Utilities Company and the said City of Lexington did the same, and evidence thereof was introduced before said Railroad Commission by both the plaintiff and the City of Lexington, and the plaintiff says that the aforesaid complaint filed as aforesaid before the said railroad commission by the City of Lexington and others against this plaintiff charging that the rates and charges promulgated by the plaintiff as aforesaid were excessive and extortionate, and the issues created by the pleadings filed in said proceeding, were all practiced and heard by the parties thereto upon the contention and theory of the said City of Lexington, that the fair value of the property owned by said Lexington Utilities Company and used and useful in rendering said service should be included as part of the rate base upon which a fair return to the plaintiff should be predicated. Plaintiff says that the said railroad commission refused on motion of the plaintiff to state in its order aforesaid fixing the said rate of 45 cents, as to whether it found in fact the said property of the Lexington Utilities Company should be included with or omitted from the

rate base on which to determine a fair return, and the plaintiff is unable to state whether the aforesaid 45 cent rate as fixed by the Commission was arrived at or intended to be arrived at and determined by said Railroad Commission on the basis of including in the rate base the fair value of the property of said Lexington Utilities Company and omitting from operating expenses the amount paid by plaintiff as rental under said lease agreement, or whether said Railroad Commission intended in determining and fixing said rate of 45 cents, to exclude from the rate base the said property owned by said Lexington Utilities Company, and to include in the operating expenses of the plaintiff the rental paid by the plaintiff to said Company. But plaintiff says, assuming that said Railroad Commission in fixing said 45 cent rate intended to exclude from the rate base the value of the aforesaid property owned by said Lexington Utilities Company, and to treat the said rental as an operating expense, then on that basis, the plaintiff's net earnings available for a return on the fair value of its property as aforesaid would be, under said 45 cent rate, less than if the fair value of the property owned by said Lexington Utilities Company were included in the rate base on which plaintiff would be entitled [fol. 26] to earn a fair return, and plaintiff says it is at least fair to its consumers at Lexington to include the fair value of said property owned by said Lexington Utilities Company, with the plaintiff's property aforesaid as part of the rate base on which the plaintiff is entitled to earn a fair return.

IX

Plaintiff says that pursuant to the terms of said franchise contract, and within two days after the effective date of said contract, it promulgated in writing the rates, charges and compensation which it then deemed to be just and reasonable, and which it proposed to charge for its gas service in the City of Lexington, and filed copies thereof with the Mayor of the City of Lexington and with said Railroad Commission. Plaintiff says that after filing its first promulgated rates it ascertained and determined that said rates would not yield to the plaintiff a fair return on the value of its property used and useful in said service,

and thereafter and during the pendency of said hearing before said Railroad Commission the plaintiff filed a new schedule of rates which it proposed to charge under said franchise contract as and from the effective date thereof, and which it contended before the said Railroad Commission were just and reasonable rates and charges. Plaintiff says that said new or amended schedule of rates and charges was and is as follows:

A monthly customer charge of 75¢.

The following monthly charge for gas:

[fol. 27] For the first 5,000 cubic feet, 65¢ per M. C. F.

For the second 5,000 cubic feet, 60¢ per M. C. F.

For all over 10,000 cubic feet, 55¢ per M. C. F.

Plaintiff says that said schedule is and would be equivalent to a flat rate of slightly in excess of 69 cents. Plaintiff says that any rates or charges less than said rates and charges would be confiscatory and would be in violation of the rights of the plaintiff under the Fourteenth Amendment to the Constitution of the United States as hereinbefore set out, and in violation of the rights of the plaintiff under Section 13 of the Constitution of Kentucky, as hereinbefore set out. Plaintiff says that even under said schedule of rates the net revenue which would be earned thereunder and which would be available for the purposes of depreciation, depletion, amortization, extraordinary maintenance and contingencies and for profit, would be insufficient for said purposes, and would not produce revenues sufficient to yield to the plaintiff a fair return on the value of its property used and useful in said service. Plaintiff says that said rates and charges as set out in the aforesaid schedule of rates, which the plaintiff contended before said Railroad Commission should be ordered and allowed as at least just and reasonable rates, would produce the following results when applied to the estimated sales to the customers of gas in the entire system and in the said City of Lexington or the Lexington District on the basis of past sales adjusted to said schedule of of rates.

	Entire system	Lexington district
Gross Revenues	$1,207,435	$747,995
Operating Expenses	917,412	528,310
Net Revenues available to cover profit, depreciation, depletion, amortization, extraordinary maintenance and contingencies	$290,023	$219,685

[fol. 28] Plaintiff further says that under the provisions of the Kentucky Statutes, Sections 201e-1 to 201e-21, and particularly under Section 201e-21, it is made the duty of the Attorney General of the Commonwealth of Kentucky to represent the Railroad Commission in proceedings to enforce its orders and in the prosecution of persons and corporations charged with violation of such orders, and this plaintiff is informed and believes that the defendant, J. W. Cammack, now Attorney General of said Commonwealth of Kentucky, will, unless restrained and inhibited as hereinafter prayed, undertake to enforce the said order of said Commission, herein complained of, and to prosecute this plaintiff under the provisions of said statutes, if the plaintiff should fail to obey said order.

XI

Plaintiff says that other sections of said Statutes, (Sections 201e-1 to section 201e-21—Kentucky Statutes) and particularly Section 201e-12, provide for the prosecution of Natural Gas Companies by indictment or penal actions for charging and collecting any rates or charges in excess of alleged just and reasonable rates or charges in the name of the Commonwealth of Kentucky upon information filed by the Railroad Commission and that such Company shall also be liable for damages to the party aggrieved in the amount of damages sustained, together with the costs of suit and attorney's fee to be fixed by the Court, but such indictment shall be made only upon recommendation of the Railroad Commission; and plaintiff says that under Section 201e-14 it is provided that if any natural gas company or any officer, agent or employe of such company should [fol. 29] charge, collect or receive any greater or higher rate for its service than the rate ordered by said Commission, said Company and each of such officer, agent or employee shall be guilty of extortion and on conviction shall be subject to very heavy penalties, of $1,000 for the first offense, $2,000 for the second offense, and $5,000 for the third and successive offenses; and plaintiff says that if it fails to obey the said order of the Railroad Commission, it is liable to indictment or penal action and to the enormous penalties aforesaid, and further to numerous suits

for damages, unless the defendant, the Railroad Commission, is restrained from filing information or recommending or requesting such indictment, and unless the defendant, J. W. Cammack, be enjoined and restrained from instituting or prosecuting any such penal action or criminal proceedings, and unless the defendants and all other persons acting by or through said defendants or otherwise, be enjoined and restrained from instituting any action or proceeding against the plaintiff under or by virtue of the order of said Railroad Commission fixing and ordering the said 45¢ rate for gas service at Lexington.

XII

Plaintiff says that said Railroad Commission by its order aforesaid and herein complained of, ordered that said 45¢ rate should be a flat rate and charge for all gas furnished by the defendant in said City of Lexington from and after January 28, 1927, which said date was declared to be in said order the effective date of said franchise contract, but plaintiff says that the effective date of said franchise contract was February 25, 1927, and the aforesaid order of said Railroad Commission fixing the said rate for gas furnished by the defendant for any period of time prior to February 25, 1927, was and is void, and the attempted enforcement thereof which is threatened as aforesaid, would be in violation of the plaintiff's rights under the Fourteenth Amendment of the Constitution of the United States, and under Section 13 of the Constitution of Kentucky.

[fol. 30] Plaintiff says that the Railroad Commission undertook by said order to provide that if within thirty days after the entry of said order either side to said controversy should have filed any proceedings in Court with respect to said rate, then the application of said rate should be suspended until there should be a final fixation in Court of said rate, but plaintiff says that said attempted or pretended order is void and invalid because the same is in excess of the powers of said Commission; that the duties and powers of said Commission are regulated by the Sections of the Kentucky Statutes hereinbefore mentioned and it is expressly provided therein and particularly under Section 201e-14 that the rate or charge for any public service, in-

cluding natural gas service, which shall be ordered by said Commission should be and become effective within ten days thereafter, and under said Statute the said Railroad Commission has no power or authority other than to order a rate or charge, and is wholly without any power to suspend any rate or charge which should be ordered by said Commission. Plaintiff further says that by said order said Commission provided that if no such proceeding should be filed within said period of thirty days, that said 45 cent rate should be put into force and effect at once. Plaintiff says that the said rate so ordered by said Commission, will, under the aforesaid Sections of the Kentucky Statutes, and particularly under Section 201e-14 thereof, be and become effective at the expiration of ten days from the entry of said order, or in any event at the expiration of thirty days from said date, and the plaintiff will then be and become subject to prosecution and fine and to further proceedings by said Commission for the enforcement of said order as hereinbefore set out, and to a multitude of actions for damages and for awards, unless the defendants [fol. 31] are enjoined therefrom by the order of this Court.

XII-

Plaintiff says that under Sub-Section E of Section 4 of said Franchise Ordinance it was and is provided that pending final determination of the fixing of just and reasonable rates and charges by said Railroad Commission, and including any subsequent proceedings in Court, it should have the right to charge, receive and collect as temporary rates and charges, not to exceed fifty cents per thousand cubic feet of gas until the Company was furnishing gas through a pipeline of sufficient capacity, or (should the purchaser of said franchise have the ten inch pipeline mentioned in Section 23 of said Ordinance)—which was the fact as to the plaintiff—through two pipe lines as provided in Section 23 of said Ordinance, and after it should be furnishing gas through a pipe line of sufficient capacity, or, as aforesaid, through two pipe lines, not to exceed sixty cents per thousand cubic feet of gas, but provided that of the amount collected under such temporary rates the Company should, under the direction or control of said Railroad Commission or of the Court, impound ten cents per one thousand cubic feet until the final fixation of just and reasonable rates and

charges as aforesaid. Plaintiff says that pursuant to said provisions of said franchise contract it collected a temporary rate of fifty cents from and after the effective date of said franchise contract up to and including the gas furnished during the month of November, 1927, at which time the plaintiff was furnishing gas through two pipe lines as aforesaid, and beginning with the month of December, 1927, the [fol. 32] plaintiff collected sixty cents per thousand cubic feet, and that out of said temporary rates so collected there was and has been impounded ten cents per thousand cubic feet, which impounded fund is now held under the orders of said Railroad Commission by John H. Carter as custodian thereof, and the amount of said impounded fund is over $200,000.00.

Plaintiff says that by its order aforesaid the said Railroad Commission is threatening to and will unless restrained and inhibited therefrom by the order of this Court, distribute said impounded fund to the consumers from whom the same was collected, to the great and irreparable damage of the plaintiff.

Plaintiff states that the aforesaid temporary rates of fifty and sixty cents were and are less than just and reasonable rates, and that under just and reasonable rates said entire impounded fund belongs to and should be paid over to the plaintiff.

Plaintiff further says that of said sixty cent temporary rate it retained fifty cents, and that under the aforesaid forty-five cent rate as fixed by said Commission, this plaintiff would be required to refund and pay to the consumers paying said fifty cent rate, the difference between the forty-five cent rate and the said fifty cent rate, to-wit: five cents per thousand cubic feet. Plaintiff says that there has already been filed with said Commission a petition on behalf of many thousands of consumers seeking to have said Commission order and make awards to said consumers of amounts paid by them in excess of forty-five cents, and to order and require this plaintiff to pay over to said Commission for distribution to said consumers the amount collected by the plaintiff under said sixty-cent rate and retained by it in excess of said forty-five cent rate. And plaintiff says that by reason of the order of said Commission fix-[fol. 33] ing said forty-five cent rate, it is now threatened with a multiplicity of suits and harassing and expensive liti-

gation, and that unless restrained by the order of this Court said Commission will proceed to make such awards, and will order this plaintiff to pay over to said Commission for distribution as aforesaid the amount collected by it in excess of said forty-five cent rate as hereinbefore set out, to the irreparable injury and damage of the plaintiff.

Plaintiff further says that under Sub-Section E of Section 4 of said Ordinance, it is provided that this Company should keep an accurate record of all sums paid in by the consumers under said temporary rates, and that the Company should, on demand from the City and if so ordered by said Railroad Commission or other tribunal or court, file with the Railroad Commission or Court where said proceedings or suit may be pending, a full and detailed statement of the amounts and times and sums contributed by each customer to said funds, but plaintiff says it was the purpose and intent and is the true meaning of said contract provision that such detailed statement should be filed only upon the final fixation of rates by said Railroad Commission and including any subsequent proceedings in Court; but plaintiff says that in violation of the true meaning of said ordinance the said Commission has, by its order aforesaid arbitrarily ordered and directed the plaintiff to file, within thirty days from the date of said order, with the Commission, a full and detailed statement and Exhibit of the names of each and all customers who have contributed to said impounded funds, together with the times and amounts of their contributions thereto, and plaintiff says that the cost of preparing and making such detailed statement and Exhibit [fol. 34] will not be less than $10,000.00, and that such expense is premature and unnecessary at this time and such expense will never be necessary at any time for under just and reasonable rates and charges for its gas service said entire impounded fund should be ordered to be paid to the plaintiff and belongs to the plaintiff, and it will never become necessary for the plaintiff to prepare or file such statement. Plaintiff says that in the event this Court shall adjudge the schedule of rates promulgated by the plaintiff as hereinbefore set out to be just and reasonable rates and charges it will never become necessary for the plaintiff to be required to file any such statement or Exhibit either in Court or before said Railroad Commission, or by reason of such finding and judgment of this Court, the entire impounded fund

would belong to the plaintiff, and plaintiff says that unless restrained by the orders of this Court, the said Commission will undertake to enforce the aforesaid order to the irreparable injury and damage of the plaintiff, and in violation of its rights under the Constitution of the United States and under the Constitution of Kentucky as hereinbefore set out.

XIV

Plaintiff says that it further complains of the order entered by said Commission fixing said 45 cent rate upon the ground that said Commission failed and refused to state and set out therein the fair value of the plaintiff's property used and useful in rendering said service, and upon which the plaintiff is entitled to earn a return, and plaintiff says that said refusal on the part of said Commission, and the ordering of said rate without fixing and setting out in its order the value of the plaintiff's property on which said Commission considered the plaintiff entitled to earn a return, was [fol. 35] arbitrary and in violation of the legal duties of said Commission, and of the rights of the plaintiff, and by reason thereof the order of said Commission is void.

XV

Plaintiff further says that under the aforesaid Sections of the Kentucky Statutes, it is the duty of said Commission to order rates and charges which shall not be discriminatory, and under said franchise contract the plaintiff is entitled to charge and collect just and reasonable rates and charges. Plaintiff says that in the schedule of rates promulgated by it as hereinbefore set out, there is included a monthly service charge of 75 cents, and plaintiff says that such service charge is reasonable and necessary in order to avoid discriminatory rates. Plaintiff says that under said flat rate of 45 cents as ordered by said Commission and under any flat rate for its gas service, there are many thousands of consumers of gas in said City of Lexington who do not and would not consume and pay for enough gas to reimburse the plaintiff for the actual cost of rendering said service, and plaintiff says that under said flat rate of 45 cents this plaintiff would be compelled to furnish its said gas service to more than forty percent of the entire number of consumers in said City of Lexington and the Lexington

District, which aggregate about 11,000 consumers, at less than the actual cost to the plaintiff of furnishing said service, and by reason thereof the plaintiff would be deprived of its property without due process of law and without just compensation, and in violation of its rights as hereinbefore set out, all to the irreparable injury and damage of this plaintiff.

[fol. 36] Plaintiff has no plain, speedy or adequate remedy at law.

Wherefore the plaintiff prays:

1st. That the rate prescribed in said order of October 9th, 1929, be decreed to be confiscatory, in violation of the Constitution of the United States and of the Constitution of Kentucky and said order imposing the same to be void;

2nd. That the defendants and each of them, and all other persons acting in concert with them or by their authority or otherwise, be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employes, to observe or put into force the rate for natural gas service prescribed by said order of October 9th, 1929;

3rd. That the defendants and each of them and all other persons acting in concert with them or by their authority or otherwise, be temporarily and permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its officers, agents or employes, to enforce any penalty or other remedy for disregarding the rate prescribed by said order.

4th. That the defendant Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. M. Lauhon, members constituting said Railroad Commission, be temporarily and permanently restrained and enjoined from distributing the impounded fund in the custody of John H. Carter to the consumers from whom the same was collected, and from requiring the plaintiff to file with said commission any [fol. 37] statement or exhibit of the names of such consumers and the time and amounts of their several contributions to said impounded funds; and on final hearing, that

said defendants be directed by mandatory injun-tion to deliver and pay the said fund to the plaintiff.

5th. That the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission be temporarily and permanently enjoined from awarding to consumers of the plaintiff amounts heretofore paid by them in excess of forty-five cents and from requiring the plaintiff to pay over to said Commission for distribution to consumers the amount collected by the plaintiff under its sixty-cent temporary rate and retained by it in excess of forty-five cents.

6th. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please Your Honor to grant unto the plaintiff a writ of subpœna directed to said defendants, the Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, J. W. Cammack, Attorney General of the Commonwealth of Kentucky, City of Lexington, and S. B. Featherstone, individually and as representing all other persons similarly situated, commanding them and each of them, on a day certain to be named therein, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath, answer under oath being hereby expressly waived, all and singular the premises and to perform and abide by such orders, instructions or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

Central Kentucky Natural Gas Company, by H. A. Wallace, President. (Seal.)

[fol. 38] *Duly sworn to by H. A. Wallace. Jurat omitted in printing.*

[fol. 39] EXHIBIT "A" TO BILL OF COMPLAINT

No. 3346

An ordinance directing the Mayor of the City of Lexington, Kentucky, to sell a franchise, authorizing the purchaser to acquire, construct, extend, maintain and operate in the streets, alleys and public places of the City of Lexington a system of mains, pipe lines, and other facilities for the distribution and sale of natural gas, mixed gas, or manufactured gas to the City of Lexington, Kentucky, to sell a franchise authorizing the terms and conditions thereof

Be it ordained by the Board of Commissioners of the City of Lexington, Kentucky:

Article I. That the Mayor of the City of Lexington, Kentucky, be and he is hereby directed to sell, upon the terms hereinafter set forth, the following franchise, viz:

Franchise

Section 1. The purchaser of the franchise, hereinafter called the "Company" and its successors and assigns is hereby granted for the term and subject to the terms, conditions and limitations hereinafter stated the right to acquire, construct, install, erect, maintain, use, and remove within six months from the expiration of this franchise but not upon its forfeiture, mains, pipe lines, governors, services and other facilities in, upon, along, through, across and under the streets, alleys and public places of the City of Lexington, hereinafter called the "City," and on and under the bridges and viaducts owned and controlled by the City, for the purpose of transmitting, distributing and selling natural gas, mixed natural and manufactured gas, hereinafter designated as "mixed gas," or manufactured gas within the boundaries of the City as they now exist or may hereafter be extended, and to acquire, construct, maintain and operate manufacturing stations and other property for said purpose.

Sec. 2. The grantor of this franchise is the City of Lexington.

* * * * * * *

Sec. 4. (A) The Company shall have the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation.

(B) The Company shall, within two (2) days after the effective date of the franchise contract promulgate in writing the rates, charges and compensation which it may deem to be just and reasonable and which it proposes to charge for its gas service, and shall on said day file a copy thereof with the Mayor of the City of Lexington and shall also, on [fol. 40] said day, file a copy thereof, and a copy of this Ordinance with the Railroad Commission for the State of Kentucky.

(C) The Board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate for such gas service, but this declaration shall not be binding on the Company, nor shall anything herein contained ever restrict the City from contending for a lower, nor the Company from contending for a higher, nor the Railroad Commission of the State of Kentucky or other tribunal in the exercise of a lawful jurisdiction, nor any court in the exercise of its jurisdiction, from fixing a lower or higher rate than forty cents ($.40) per one thousand (1,000) cubic feet of gas.

(D) In the event the rates and charges promulgated and filed by the Company as aforesaid, shall, in the opinion of the City, be in excess of just and reasonable rates and charges then the City shall proceed before the Railroad Commission as provided in Sections 201e-1 to 201e-20 of the Kentucky Statutes, and in such proceeding the Company shall assume the burden of proving that the rates and charges promulgated by it as aforesaid, are just and reasonable.

(E) Pending the final determination of such controversy and the fixing of just and reasonable rates and charges by said Railroad Commission and including any subsequent proceedings in court, the Company shall have the right to charge, receive and collect as temporary rates and charges not to exceed fifty cents ($.50) per one thousand (1,000) cubic feet of gas until the Company is furnishing gas through a pipe line of sufficient capacity, or (should the

purchaser hereof already have that ten inch line named in Section 23) then through two pipe lines, as provided in Section 23 of this ordinance, and after it is furnishing gas through a pipe line of sufficient capacity, or (should the purchaser hereof already have that ten inch line named in Section 23), then through two pipe lines as aforesaid, not to exceed sixty cents ($.60) per one thousand (1,000) cubic feet of gas; but provided that of the amount collected under such temporary rates the Company shall under the direction and control of said Railroad Commission, or of the court, impound ten cents ($.10) per one thousand (1,000) cubic feet until the final fixation of just and reasonable rates and charges as aforesaid. Upon final determination of just and reasonable rates and charges as aforesaid, the sums so impounded together with all interest accumulations thereon shall be distributed under the order of said Commission, or court to the Company, or to its several customers, or in part to each, as the final determination may direct. If the Company during any part of the time prior to said final determination shall have collected sums including or other than those impounded, in excess of the rates and charges as finally determined, it shall then and thereupon repay said excess sums to the several customers who may have made such payments. The Company shall give to each customer a receipt for the amount paid by him pending the final determination of said suit or proceeding. It shall also keep an accurate record of all sums paid in by all and any of its customers under temporary rates and said records shall at all times be open to the City and to any customer as to his own contributions thereto; and the Company on demand from the City, if so ordered by said Railroad Commission, or other tribunal, or court shall file with said Railroad Commission or court, where said proceeding or suit may be pending, a full and detailed statement of the amounts, times and sums contributed by each customer to [fols. 41–43] said funds. In addition to said temporary rates hereinabove provided for, the Company shall have the right to charge three cents ($.03) per one thousand (1,000) cubic feet, if the bill for services is not paid within ten (10) days after said bill is mailed or delivered to the customer.

(F) The rates, charges or compensation to be charged, demanded and collected by the Company as herein provided shall be the total rates, charges and compensation charged, demanded and collected by the Company and they shall not be increased by any other charge or device of any kind or description. The rates, charges and compensation finally fixed and determined as provided in Sub-section (D) hereof shall continue in effect until modified, altered or changed under and pursuant to the provisions of the franchise, as hereinafter provided.

Sec. 5. The Company shall print and file with the Board schedules which shall be kept open for public inspection, showing all rates, charges, compensation, and forms of contract or agreement made, established or enforced or to be enforced to customers in the City, all rules and regulations relating to rates, charges or service rendered or to be rendered, and all privileges and facilities rendered or allowed by the Company to its customers. Such schedules shall also be kept by the Company readily acces-ible to and for convenient inspection by the public in every office of the company where contracts or applications for services are issued or received by the Company. Such schedules shall be immediately produced by the Company for inspection upon the demand of any person.

Sec. 6. The Company shall not charge, demand, collect or receive a greater or less or different compensation for any similar service rendered or to be rendered than the rates and charges applicable to such service and in effect at the time, nor shall the Company refund or remit in any manner or by any device any portion of the rates or charges so specified; nor extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege of facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

Sec. 7. Whenever at any time after the expiration of two (2) years from the date of the final determination of the rates and charges for natural gas, or for mixed gas, or for manufactured gas by the highest court to which the same may be taken, or whenever at any time after the expiration of three (3) years from the date of the fixation of such

rates and charges by any tribunal authorized to regulate such rates and charges, either the City or Company desire to raise the question as to whether or not the rates and charges then in force and effect are just and reasonable, the party so desiring to raise such question shall notify the other party in writing, and in the event they shall not agree upon just and reasonable rates and charges, they shall proceed as provided for in Section 201c-1 to 201c-20, inclusive, of the Kentucky Statutes, or in such other manner as the law may then provide.

* * * * * * *

[fol. 44] Sec. 22. From and after the time when the Company is furnishing gas through a pipe line of sufficient capacity, or through two pipe lines as provided in Section 23, the Company agrees that it will furnish gas to the consumers of the City of Lexington for all usual purposes at all times at a uniform and adequate pressure at the outlet of each customer's meter, subject to conditions beyond its reasonable control, and subject to strikes and riots.

The Company shall provide and install within four months after the date when this franchise becomes effective, and maintain thereafter, not less than five recording pressure gauges in the City of Lexington. Each such gauge shall be located, subject to the direction of the Board, as near as practicable to the point of minimum pressure in its district, and a separate service shall be provided in each case from the main to the gauge, no gas consumption being taken from said service. Each chart taken from these gauges shall be marked with the location of the gauge from which it is taken and the dates it was placed and removed, and shall be filed and preserved by the Company at its office in the City of Lexington for not less than three (3) years. Said charts may be inspected and examined by the Board or its representatives at any time during regular business hours. Within three months after the date when this franchise becomes effective, the Company shall notify the Board of the location of each such gauge. The Company shall also notify the Board of every change in location and of all new locations of gauges within five days from the date of such change or new location.

The Board shall have power to require the Company to [fol. 45] change the location of any such gauge and to install such additional recording pressure gauges as in its judgment are necessary when the limits of the City or the extent of the territory supplied under this franchise may be enlarged or extended and the Company shall, upon written notice from the Board, re-locate such gauges and install such gauges at locations as directed.

Sec. 23. The Company agrees, and such agreement is a condition upon which the franchise is granted, that it will begin or cause to have begun within three months after this franchise becomes effective the construction of, and have in operation or cause to be operated within twelve months thereafter, a main line or lines of pipe from adequate sources of supply of natural gas in the State of Kentucky or in the State of West Virginia to the distribution system in the City of Lexington; said main line or lines shall be of sufficient capacity and shall be provided with sufficient and adequate compressor stations and other necessary equipment to supply such quantities of natural gas as may be required to enable the Company to comply with the terms of this franchise. Provided, however, that if the Company shall have a ten-inch transmission pipe line which is being used for transporting natural gas from the eastern part of the State of Kentucky to the City of Lexington, then the Company shall begin or cause to have begun within six months after this franchise becomes effective the construction of, and have in operation or cause to be operated within nine months thereafter an additional main line or additional lines of pipe from adequate sources of supply of natural gas in the State of Kentucky or the State of West Virginia to the distribution system in the City of Lexington; said additional main line or lines shall be of such capacity and shall be provided with sufficient and adequate compressor stations and other equipment to supply such additional quantities of natural gas as may be required to enable the Company to comply with the terms of this franchise. If the construction and operation of the additional line of pipe as herein provided be delayed by cause or causes beyond the control of the Company, such delay or delays shall not be considered in estimating the time within which the same shall be constructed and put in operation.

It is especially reserved and provided that should the Company fail to have said two pipe lines constructed and supplying gas as is herein provided, the City may, upon six months written notice to the Company, declare this contract at an end.

Sec. 24. The Company hereby agrees and binds itself by the acceptance of this franchise to take all reasonable means and measures necessary to furnish an adequate supply of natural gas to the City of Lexington and its inhabitants at all times during the term of this franchise.

* * * * * * *

[fol. 46] Sec. 27. The City of Lexington and the Company, by the sale and acceptance of this franchise, expressly agree and obligate themselves to comply with all of the terms and conditions of this franchise. The Company by the acceptance of this franchise expressly agrees and obligates itself to comply with all ordinances and regulations passed in accordance therewith. The Company further agrees that in the event that it shall be in default in the observance of performance of any of the terms, conditions, ordinances or regulations herein required to be kept and performed by it, it will pay to the City not less than fifty dollars nor more than five hundred dollars per day, as determined by the Board, or in case of suit, by the Court, for each and every day of default except where it is otherwise specifically provided herein; and if any such default shall continue beyond a period of time, not less than thirty days, which the Board shall designate and of which written notice shall be given to the Company by the Board, the Board shall be entitled to declare this grant and all of the rights and privileges of the Company hereunder forfeited and at an end; provided, however, that if the Company shall begin within the period hereinbefore named and shall prosecute with diligence an action to determine whether the Company is in default, the Board shall not declare this grant and all of the rights and privileges of the Company hereunder forfeited and at an end until such action shall have been determined and the Company allowed thirty days from the date of such determination within which to remove such default; and when the [fol. 47] Board shall have so declared said rights and privi-

leges forfeited and at an end, they shall cease and the title of the Company to its property in the streets, alleys and public places shall pass to and vest in the City. Provided that no failure to exercise such forfeiture shall be a waiver of the right so to do at any other such time; and further provided that neither the provision for nor the imposition of, said penalty or any part thereof shall conclude the rights of the City or any customer to enforce the Company to comply, by appropriate proceedings, with any or all of the obligations hereby imposed upon, or assumed by it, or to enforce compensation for any failure by the Company to comply with such obligations.

* * * * * * *

Sec. 30. The right and privileges hereby granted shall continue for a period of twenty years from and after the date of the passage of this ordinance unless the same be sooner forfeited as herein provided.

Sec. 31. None of the rights or privileges granted by this franchise is an exclusive right or privilege, and the Board expressly reserves the right to grant like franchises, rights and privileges to other persons or corporations.

* * * * * * *

Sec. 34. The Board shall have the power to establish such reasonable ordinances, rules and regulations to carry into effect the provisions of this franchise as it may deem necessary, and to modify, alter and amend such ordinances, rules and regulations from time to time.

Sec. 35. The cost of conducting all hearings instituted by the City or by the Company before the Railroad Commission, court or other tribunal, to which both the City and Company are parties shall be paid equally by the City and the Company; but each shall pay all fees and expenses of all witnesses, experts and lawyers engaged or called by it.

* * * * * * *

[fol. 48] Sec. 37. In any proceeding in the Railroad Commission, Court, or other tribunal or before the City Commissioners under Section 7 of this Ordinance, where the

rates or regulations as provided for under the provisions hereof are being assaulted, or sought to be regulated by agreement under said Section 7 by the Company or the City, any customer, or group of customers of the Company may appear and become a party thereto, and before any hearing shall be instituted for a fixation of rates before the City Commissioners as provided in Section 7 notice of any proposal to change the rates and of any hearing thereof shall be first published for a period of not less than five days in the official newspaper of the City of Lexington.

Article II. The above franchise shall be sold at public auction at the Mayor's office, in the City of Lexington to the highest and best bidder. * * * The said franchise shall be sold by the Mayor within thirty days after this ordinance becomes effective and at twelve o'clock, noon. The exact date shall be fixed by the Mayor. Before making this sale, however, the Mayor shall advertise the time, terms and conditions thereof in the official newspaper of the City of Lexington, which advertisement shall be published at least ten days next prior to the day of sale, including the day of sale.

Article III. The Company shall file with the Board within ten days after the sale of this franchise a written acceptance thereof in a form acceptable to the Board.

Article IV. The successful bidder shall, within ten days after such sale is made, pay to the Mayor the amount of its bid as provided in Article VI, and shall also execute to the City a bond in the sum of twenty-five thousand dollars with surety to be approved by the Mayor as a guarantee of faithful compliance with the terms of the franchise.

* * * * * * *

Article VI. The Mayor shall not sell the franchise herein [fol. 49] directed to be sold for less than fifteen thousand ($15,000) dollars.

* * * * * * *

Article VIII. The Mayor shall report his acts hereunder to the Board of Commissioners and said Board shall have the right to reject any and all bids.

Article IX. By reason of the public health and safety an emergency is hereby declared and this ordinance shall take effect immediately after it is signed, recorded and published.

Introduced January 21, 1927, and remained on file one week for public inspection in its completed form.

Passed by unanimous vote of Board of Commissioners January 28, 1927.

Hogan Yancey, Mayor.

Attest:

J. F. Price, City Clerk.

Jan. 29, 1927.

[fol. 50] IN UNITED STATES DISTRICT COURT

MOTION FOR AN INTERLOCUTORY INJUNCTION AND FOR TEMPORARY RESTRAINING ORDER—Filed October 19, 1929

Comes the plaintiff, Central Kentucky Natural Gas Company, and states that it has filed its verified petition in the above entitled cause and thereon now moves the Honorable Judge of this Court as hereinafter set out.

1. The plaintiff moves the Court to grant herein an interlocutory injunction as follows, to-wit:

(a) Restraining and enjoining the defendants and each of them, and all other persons acting in concert with them or by their authority or otherwise, from any attempt to compel the plaintiff, its officers, agents and employees, to observe or put into force the rate for natural gas service prescribed in the order of the defendant Railroad Commission entered on the 9th day of October, 1929, and set out in full in the Bill of Complaint filed herein.

(b) Restraining and enjoining the defendants and each of them, and all other persons acting in concert with them, or by their authority or otherwise, from taking any steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or other remedy for disregarding the rate prescribed by said order.

(c) That the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, be restrained and enjoined from distributing the impounded fund in the custody of John H. Carter to the consumers from whom the same was collected, and from requiring the plaintiff to file with said Commission any statement or exhibit of the names of such consumers and the time and amounts of their several contributions to said impounded funds.

[fol. 51] (d) Restraining and enjoining the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, from awarding to consumers of the plaintiff amounts heretofore paid by them in excess of forty-five cents (45¢) and from requiring the plaintiff to pay over to said Commission for distribution to consumers the amount collected by the plaintiff under its sixty cent (60¢) temporary rate, as set out in the Bill of Complaint, and retained by it in excess of forty-five cents (45¢).

2. To the end that the plaintiff's motion for an interlocutory injunction may be heard and disposed of as is provided by Section 266 of the Judicial Code, the plaintiff moves the Honorable Judge of this Court to call to his assistance for the purpose of hearing and determining the plaintiff's application and motion for such interlocutory injunction, two other judges, and to fix and set a day certain for the hearing of said motion in order that the plaintiff may give due notice thereof, as is required under the Provisions of said Section 266.

3. The plaintiff further moves the Honorable Judge of this Court that pending the hearing and determination of the plaintiff's aforesaid motion for an interlocutory injunction herein, to grant and issue a temporary restraining order herein, restraining and enjoining the defendants and each of them, and all persons acting in concert with them or by their authority or otherwise, as hereinbefore set out in plaintiff's motion for an interlocutory injunction, and until said motion for an interlocutory injunction shall be heard and determined; and in support of this motion for a temporary restraining order the plaintiff refers

to and relies upon and now presents to the Honorable Judge of this Court, its verified petition filed in this action.

D. L. Hazelrigg, Chester J. Gerkin, Allen, Botts & Duncan, Attorneys for Plaintiff.

[fol. 52] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Entered October 19, 1929

This day came the plaintiff, Central Kentucky Natural Gas Company, and filed its motion in the above entitled cause for an interlocutory injunction, and also filed its motion for a temporary restraining order; and the Court having read the verified Bill of Complaint filed in this action, and being of opinion that irreparable loss or damage would result to the plaintiff unless a temporary restraining order is granted herein as moved by said plaintiff and as prayed for in said Bill of Complaint, it is now ordered and adjudged that pending the hearing and determination of the plaintiff's aforesaid motion for an interlocutory injunction, that the defendants and each of them, and all persons acting in concert with them or by their authority or otherwise, be restrained and enjoined as hereinafter set out, to-wit:

1. That the defendants and each of them, and all other persons acting in concert with them or by their authority or otherwise, be restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to observe or put into force the rate for natural gas service prescribed in the order of the defendant Railroad Commission entered on the 9th day of October, 1929, and as fully set out and pleaded in the Bill of Complaint filed herein.

2. That the defendants and each of them, and all other persons acting in concert with them or by their authority or otherwise, be restrained and enjoined from taking any [fol. 53] steps or proceedings against the plaintiff, its officers, agents or employees, to enforce any penalties or other remedy for disregarding the rate prescribed by said order.

3. That the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, be restrained

and enjoined from distributing the impounded fund in the custody of John H. Carter to the consumers from whom the same was collected, and from requiring the plaintiff to file with said Commission any statement or exhibit of the names of such consumers and the time and amounts of their several contributions to said impounded funds.

4. That the defendants, the Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, be restrained and enjoined from awarding to consumers of the plaintiff amounts heretofore paid by them in excess of forty-five cents (45¢), and from requiring the plaintiff to pay over to said Commission for distribution to consumers the amount collected by the plaintiff under its sixty cent (60¢) temporary rate as set out in the Bill of Complaint, and retained by it in excess of forty-five cents (45¢).

5. As a condition to the granting and issuance or enforcement of this temporary restraining order, the plaintiff is required and ordered to execute bond, with good and sufficient surety, in the sum of $10,000, binding the plaintiff to pay all monies and costs which shall be adjudged against it in favor of the defendants, or any of them, in the event it shall be determined that this temporary restraining order should not have been granted and issued.

6. Thereupon came the plaintiff and executed bond as hereinbefore ordered and required, with The Fidelity & Deposit Company of Maryland as surety thereon, and said bond having been submitted to the Court it is approved.

[fol. 54] 7. This temporary restraining order shall continue in full force and effect until the plaintiff's aforesaid motion for an interlocutory injunction shall have been heard and determined.

Done at Lexington, Kentucky, this 19 day of October, 1929.

A. M. J. Cochran, Judge.

* * * * * * *

[fol. 55] IN UNITED STATES DISTRICT COURT

MOTION BY DEFENDANTS TO DISMISS THE BILL OF COMPLAINT—

Filed November 8, 1929

Come now the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, J. W. Cammack, Attorney General of the Commonwealth of Kentucky, City of Lexington, a municipal corporation, and S. B. Featherston, individually and as representing all other persons similarly situated, and respectfully move the Court to dismiss the bill of complaint herein, for the following reasons, to-wit:

I

Because the bill contains no statement of any grounds sufficient to sustain or invoke the jurisdiction of a Federal [fol. 56] Court, and because the court has no jurisdiction of the action nor of the subject-matter thereof.

II

Because the allegations of fact set forth in the bill are insufficient to constitute a valid cause of action in equity, and because of want of equity in the said bill.

Robt. H. Winn, D. C. Hunter, S. H. Brown, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Nov. 14, 1929

The answer of the defendants, Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and T. H. Lauhon, members constituting said Railroad Commission, J. W. Cammack, Attorney General of the Commonwealth of Kentucky, City of Lexington, a municipal corporation, and S. B. Featherston, individually and as representing all other persons similar- situated, and the joint and several

answer of the said defendants, to the bill of complaint herein.

Now come the aforesaid defendants and for answer to the bill say:

I

That this court has no jurisdiction of this action, nor of the subject-matter thereof, and that the bill contains no statement of any ground sufficient to sustain or invoke the jurisdiction of a Federal Court.

[fol. 57]

II

That the allegations of fact as set forth in the bill are insufficient to constitute a valid cause of action in equity, and that there is no equity or ground of equitable jurisdiction, or of equitable relief set up in the said bill.

III

That it is untrue and they deny that the action set up in the bill arises under the Constitution, or the laws of the United States, or particularly, or at all, under the Fourteenth Amendment to said Constitution, or that the rate prescribed in the order of the Railroad Commission of date October 9th, 1929, is unjust, or discriminatory, or confiscatory of plaintiff's property.

IV

That it is untrue and they deny that this suit involves the right of the plaintiff to have established or fixed for rate-making purposes the fair or reasonable value of its property devoted to public use, or the determination of a fair and reasonable return upon said value, or that said order does not properly or legally give consideration to the present value of plaintiff's property, or in accordance with competent evidence of such value presented to the Railroad Commission, or that any such evidence was presented, or is confiscatory of plaintiff's property used or useful in furnishing gas service to the public, or at all, or that said order deprived plaintiff of its property without due process of law, or denies plaintiff the equal protection of the laws in violation of plaintiff's alleged rights under the Fourteenth Amendment to the Constitution of the United

States, or is, therefore, null or void, or that said order is in violation of the rights of the plaintiff under Section 13 of the Constitution of the Commonwealth of Kentucky, or in that same would (or that same would) result in the taking of plaintiff's property without just compensation therefor.

[fol. 58] V

That it is untrue and they deny that the rate of 45 cents is less than a just and reasonable rate, or is confiscatory as alleged in said bill, or otherwise, or that the enforcement thereof against the plaintiff would be in violation of the plaintiff's rights under and as prescribed by the Fourteenth Amendment to the Constitution of the United States, or that said rate, or its enforcement, would deprive the plaintiff of its property without due process of law, or would constitute a denial to the plaintiff of equal protection of the law, or that said rate, or its enforcement would also be in violation of the plaintiff's rights under Section 13 of the Constitution of the State of Kentucky, or that said rate or its enforcement would deprive the plaintiff of its property without just compensation.

VI

That it is untrue and they deny that all of plaintiff's property is located in the State of Kentucky, or in the Eastern District thereof, or that the fair or reasonable value of the properties used or useful in furnishing gas service and owned by the plaintiff, or after making all or due allowance or deductions for existing depreciation in the physical property was not less than $5,610,829.00 as of December 31st, 1926, or is substantially or at all higher than said amount at the present time, or that the fair or reasonable value of the property leased by plaintiff, or owned by the Lexington Utilities Company, or used or useful in furnishing gas service to consumers in Lexington, or after making all or due or any allowances or deductions for depreciation in the physical property was not less than $730,069.00 on the date aforesaid, or substantially higher at the present time, or that the total or fair or reasonable value of the combined properties owned or leased by the plaintiff, or used or useful in furnishing said gas service, or after mak-

[fol. 59] ing all, or due, or any allowances or deductions for existing depreciation of the physical property was not less than $6,340,895.00 as of December 31st, 1926, or is substantially, or at all, higher than the said amount at the present time, or that the value of plaintiff's property used and useful in furnishing said gas service ever was or is in excess of $1,189,489.00, or that the fair or reasonable value of the property leased by the plaintiff from the Lexington Utilities Company, used or useful in furnishing said gas service ever has been or is in excess of $549,209.00, or that the entire property used or useful in said gas service may for convenience, or should be, divided into two classifications, physical or tangible, or intangible, or that the physical or tangible properties may, or should be divided into the production system, or the transmission system, or the distribution system, or general property, or general overheads, or undistributed construction' expenditures, or which are made up of organization costs, or construction overheads, or that which latter consists of engineering during construction, or legal expenses during construction, or administration during construction, or insurance, or damage during construction, or that none of same are included in the cost of labor or materials going into the plant, or are a part of the total cost of the constructed plant, or cost of financing, or which is the cost of the service for assembling the necessary capital to construct the plant, or working capital which is made up of materials or supplies, or which include materials or supplies necessary to have on hand in the operation of the Company, or cash necessary for carrying on the business, or that intangible properties may be or should be divided into going concern value, or the element of value, or property, or property in an assembled or established plant doing business or earning money upon which the owner has the right to make a fair return, or cost of obtaining new franchises, or which is the actual cost expended by the Company in procuring [fol. 60] its franchise under which it is permitted to operate within municipalities, or that the aforesaid alleged items, or the fair or reasonable value thereof, or which constitute the aforesaid entire or any combined or other properties of plaintiff or said Lexington Utilities Company, or used or useful in said gas service, or that portion properly allocated to the Lexington district, or used or useful in said

Lexington district, were as of December 31st, 1926, as set up in the bill in extenso in paragraph VII of the bill herein, or of any value in excess of those set up in paragraph — of this answer.

On the contrary defendants aver that said table or schedule of value, and each and every item thereof, as set up in paragraph VII of the bill is grossly overstated, padded, unreasonable, and unfair; and that since this rate proceeding began practically the entire capital stock of plaintiff Company (5995 out of 6000 shares) sold as an entity for a net price of $47.00 per share, equalling $2,820,000.00 (a too high price at that) for these exact same properties that plaintiff Company asserts in said tabulation to be of the value of $5,610,829.00!

Or that the business of mining for, or producing, or selling, or working, or distributing natural gas is one of exceptional, or any, hazard, or that the subject-matter of the investment therein is exhausted in its use within a comparatively short period of time, or that by reason thereof, or at all, the investment in, or the acquisition or development of, natural gas lands, or in the facilities for the transportation of natural gas to points of consumption must be amortized within the life of the producing fields from which natural gas is or may be obtained, or such necessity for amortization exists where the producing fields are owned by the distributing company, or are owned by other producers from whom gas is purchased by the distributing company for sale or distribution, or that a rate of return [fol. 61] upon the value of the property of such distributing company, or use or useful in the public service which fails or does not take into account the factors aforesaid, is unjust or unreasonable or confiscatory, or that under the rate of 45 cents for gas at Lexington plaintiff's earnings for the year 1926 would not have been in excess of $1,003,952.00 for its entire system, or *of* in excess of $598,777.00 for the Lexington district, or that its operating expenses for said year would have been as much as $767,235.00 for its entire system, or $448,655.00 for the Lexington District, or that the net earnings for said year, or after paying operating expenses, or without making any allowances whatsoever for taxes, would have been $236,715.00 for the entire system, or $150,122.00 for the Lexington district, or that said accounts would be insufficient for depletion or depre-

ciation or amortization or extraordinary maintenance, or a reasonable allowance for contingencies, either for the entire system or for the Lexington district, or for both, or would leave nothing for return on plaintiff's property used or useful in rendering said service, or either for the entire system, or for the Lexington district, or that under said 45 cent rate it would be compelled to furnish said gas service at an actual loss, or both, for its entire system, or for the Lexington district, or that same would be true for the year 1927, or the year 1928, or that under said 45 cent rate at Lexington the revenue- available for said purpose would have been less in 1927 or in 1928 than they were in 1926, as based on actual operations.

VII

That it is untrue and they deny that prior or subsequent to the purchase by plaintiff of its present franchise from the City of Lexington it was contended by the City of Lexington that in determining the rates or charges for service in Lexington the lease agreement with the Kentucky Util- [fol. 62] ities Company should be disregarded, or the rental paid thereunder omitted, or left out of consideration as an operating expense, or that the fair value of the property owned by the Lexington Utilities Company should be added to the fair value of the property owned by the plaintiff, or properly allocated to the City of Lexington for the purpose of arriving at or determining the total fair value of the property used or useful in rendering said service in Lexington, or that such total fair value should be adopted or considered as the rate basis upon which the plaintiff should be allowed a fair return, or that by reason of any such contention plaintiff caused to be made an inventory or valuation of the said property of the Lexington Utilities Company, or that the City of Lexington did the same for any such alleged reason, or for any reason other than plaintiff's own adoption of an allegiance to said method of treating the Lexington Utilities property.

That, upon the contrary, the defendants aver and state that there never was, and is not now, any reason whatsoever for treating the properties of the Lexington Utilities Company as a part of the properties of the plaintiff Com-

pany for rate base purposes; that never at any time, or anywhere in the entire record, did the defendants take any such position; but that the plaintiff Gas Company assumed for itself the said theory upon some chance query or reflection, in some conference about the matter, that the properties of the Lexington Utilities Company might be so treated; and that plaintiff Company seized upon said query and built up for itself this theory of joint capitalization of both companies, a theory which defendants have always repudiated as unsound and upon which they bottomed no single step in this entire proceeding.

That while it may be true that the Railroad Commission refused to state in its order, among many other useless [fol. 63] details asked by plaintiff, whether or not the properties of the Lexington Utilities Company, and other facts with reference thereto, were included in the rate base adopted by the Commission, the entire record makes perfectly patent that the Railroad Commission did not (as under the law it could not) embrace in its decision the properties of the Lexington Utilities Company (an arm's length contractor with the plaintiff company) as a part of the assets of the plaintiff Company.

That it is untrue and they deny that on any basis the plaintiff's net earnings available for a return on the fair value of its property under said 45 cent rate would be less than if the fair value of the property owned by the Lexington Utilities Company were included in the rate base on which plaintiff would be entitled to a fair return, or that it is at least, or at all, fair to its consumers at Lexington to include the fair value of said property owned by said Lexington Utilities Company with the plaintiff's property aforesaid as a part of the rate base on which the plaintiff is entitled to a fair return.

That the defendants, all the while denying that the properties of any other arm's length corporation, or person, having to do with the sale and distribution of gas in Lexington, should be included in the rate base, state and aver that plaintiff Company is buying gas which it is distributing in the City of Lexington from a corporation known as the Petroleum Exploration, to which it is paying for said gas, so supplied in very considerable quantities, 40 cents per thousand feet (as defendants are informed); that said contract price is more than three times what

natural gas is worth, and at which it may be purchased for plaintiff Company's use in its deliveries to the City of Lexington; and that if there be admitted as a part of the rate base assets the properties of the Lexington Utilities Company utilized in distribution, there should be brought into the matter as well the production assets of the Petro-
[fol. 64] leum Exploration, and its gas charged for as an annual expense at not exceeding 12½ cents per thousand feet, instead of the extravagant price of 40 cents per thousand at which said gas is being bought by plaintiff Company.

VIII

That it is untrue and they deny that after filing its first promulgated rates, plaintiff ascertained or determined that said rates would not yield to the plaintiff a fair return on the value of its property used or useful in said service, or that said schedule named in paragraph IX of the bill, is or would be equivalent to a flat rate of slightly in excess of 69 cents, or that any rates or charges less than said rates or charges would be confiscatory or would be in violation of the rights of the plaintiff under the Fourteenth Amendment to the Constitution of the United States, or in violation of the rights of the plaintiff under Section 13 of the Constitution of Kentucky, or that under said schedule of rates the net revenue which would be earned thereunder, or would be available for the purposes of depreciation, or depletion, or amortization, or extraordinary maintenance, or contingencies, or profit, would be insufficient for said purpose, or any of them, or would not produce revenues sufficient to yield to the plaintiff a fair return on the value of its property used or useful in said service, or that the rates or charges as set out in said schedule of rates would produce, when applied to any fairly estimated sales to customers of gas under the entire system, or in the City of Lexington, or the Lexington district, on any basis of past sales, or as adjusted to said schedule of rates, gross revenues for the entire system of $1,207,435.00, or any part of same, or for the Lexington district $747,995.00, or any part of said sum, or for operating expenses the sum of $917,-412.00 for the entire system, or any part of said sum, or $528,310.00 for the Lexington district, or any part of said

[fol. 65] sum, or net revenue available to cover profit, or depreciation, or depletion, or amortization, or extraordinary maintenance, or contingencies, the sum of $290,023.00, or any part of said sum for the entire system, or the sum of $219,685.00, or any part of said sum, for the Lexington district.

Defendants state that under the franchise-contract set up in the bill, and under Section 4B thereof, plaintiff Company had no right to file before the said Railroad Commission, or to insist upon, or to contend for, any other rates, charges or compensation than those which it in said section and sub-section agreed to file, and did file within said two days; and that further under no circumstances has the plaintiff any right to contend for any meter charge or monthly customer charge of 75 cents per month, or any sum whatsoever, in that and because that, under Section 4F of said franchise-contract it is specifically provided that the rates as ascertained and fixed under the proceedings therein named "shall not be increased by any other charge or device of any kind or description", and that the attempt to impose said meter charge is an attempt to impose such a charge or device, and is in direct contravention of plaintiff's contract undertaking.

That it is untrue and they deny that the plaintiff is either informed or believes that the defendant J. W. Cammack, now Attorney General of the Commonwealth of Kentucky, will, unless enjoined or inhibited, or at all, or otherwise, or that it is true that the defendant Cammack will undertake to enforce the order of the Railroad Commission, or to prosecute the plaintiff under the provisions of Section 201e-1 and following of the Kentucky Statutes, or at all.

Upon the contrary the defendant Cammack avers and states that he will abide by the order of the said Railroad Commission of date October 9th, and particularly will abide by the contract provision of the franchise set up with the bill, by which plaintiff Company has the right to collect, pending litigation, 60 cents per thousand for its gas sold [fol. 66] in Lexington, and that he, the defendant Cammack, specifically disclaims any purpose to take any legal steps whatsoever as against plaintiff Company with respect to said 45 cent rate as long as said contract provision is in force.

IX

That it is untrue and they deny that plaintiff is liable to indictment or penal action, or to any penalties, or to suits for damages, unless the Railroad Commission is restrained from filing information or recommending or requesting such indictment, or unless the defendant Cammack be enjoined from instituting or prosecuting any such penal action or criminal proceeding, or unless the defendant, or all, or any other persons, be enjoined or restrained from instituting any action or proceeding against the plaintiff under or by virtue of the order of said Railroad Commission fixing or ordering the said 45 cent rate for gas service at Lexington.

Upon the contrary the defendants state and aver that none of them intends, or threatens, or expects, to enforce, or to endeavor to enforce, said order, or to start any prosecutions, or procure any indictments or informations, or other legal proceedings thereunto as long as there is effective and in force that 60 cent contract rate set up in the next paragraph hereof.

X

That it is untrue and they deny that the order of October 9, 1929, is void or invalid, or that same is in excess of the powers of the defendant Commission, or that under Section 201e-14 of the Kentucky Statutes the Commission has no power or authority to suspend the particular charge fixed by said order, or that under the named sections of the Kentucky Statutes the said order would be, or become, effective, or is effective at the expiration of ten days from the [fol. 67] entry of said order, or in any event at the expiration of thirty days from said date, or that the plaintiff will then be or become subject to prosecution, or fine, or to further proceedings by said Commission for the enforcement of said order or to a multitude, or any action for damages or awards, unless the defendants are enjoined or restrained therefrom, or at all.

That the practice followed by the Railroad Commission of Kentucky in the entry of said order of October 9th was and is in exact conformity to the agreement and engagement of the plaintiff Company and the defendant City of

Lexington, as in the following way and in the following manner, to-wit:

(a) That said franchise contract filed with the bill herein provides, in Section 4(B) thereof that within two days after the franchise became effective plaintiff Company should file a copy thereof with the defendant, the Railroad Commission of Kentucky.

(b) That as a matter of fact and in compliance with its said engagement plaintiff Company did, as within said two days, file said franchise contract as a basis and as a part of its complaint, before the Railroad Commission of Kentucky, which is that same complaint out of which resulted the order of October 9th, 1929, made by said Commission fixing said rate at 45 cents; and that in paragraph VI of the bill herein plaintiff Company specifically sets out that it did so file said contract; and it specifically pleads in the said numbered section (as was the exact truth) that it, the plaintiff, instituted the said proceeding before the Railroad Commission directly under the terms of, and as is set out in, the said contract should be done.

(c) That said contract further provided, in Section 4(D) thereof, that as within said two days the plaintiff Company should file its schedule of rates before said Railroad Commission; that the defendant City if dissatisfied therewith should plead before the Commission, assaulting the said rates; that it did so plead (all as is set up in the bill herein), [fol. 68] and that upon a hearing to be conducted thereon the plaintiff Company should assume the burden of proving that its rates and charges so filed were just and reasonable.

(d) That said franchise contract further provided in Section 4(E) thereof that pending the determination of said controversy and the fixing of just and reasonable rates "by said Railroad Commission and including any subsequent proceedings in court," the Company should have the right to charge and collect for its gas 60 cents per one thousand feet, and down and until "the final fixation of just and reasonable rates," all as is set up under paragraph XII of the bill herein.

(e) That the defendants, both the City of Lexington, the said Railroad Commission and its members, have at all

times conducted said hearing and proceeding, and that defendant Railroad Commission's order of October 9th, 1929, was in exact accord with the terms of said franchise contract, and that particularly the withholding of the application of said 45 cent rate as provided in said order, pending the court proceeding named in said franchise contract, was and is in exact accord with the terms of said franchise contract; and that by reason of said facts, and by reason of plaintiff Company's engagement and agreement to collect and be satisfied with 60 cents per thousand feet pending the final fixation of rates as provided in said contract, plaintiff Company is now estopped to question in any way the said agreed procedure and the said order of the said Railroad Commission so postponing the application of said rate as in exact accord with the spirit and terms of plaintiff Company's own contract, the which estoppel these defendants specifically plead and rely upon in bar of the prosecution of this action.

Defendants, and each and all of them, further aver and state, and now by their pleading here bind themselves to, and agree that they will in all respects, be held and bound [fol. 69] by the said 60 cent pendente lite agreed rate, and that they expect to, and will, take no step of any nature or kind to evade or avoid the said agreement, or to put into application the 45 cent rate named in the said order of the Railroad Commission of October 9th, 1929, as long as the said matter is under litigation, as is provided in said franchise contract; and that defendants, and each and all of them, aver and state that they are not the subject of injunction, and should not be enjoined from doing that thing or those things which each and all of them distinctly aver their purpose not to do.

XI

That it is untrue and they deny that unless restrained by the order of the court the Commission will make any awards, or will order the plaintiff to pay over to the Commission for distribution the amount collected by it in excess of said 45 cent rate, or to the irreparable injury or damage of the plaintiff, or at all, or that it was the purpose or intent of the contract provision in said franchise covering the impounded funds that the detailed statement therein named should be

filed only upon the final fixation of rates by the Railroad Commission, or including any subsequent proceedings in court, or that in violation of the true meaning of the said ordinance the Commission has arbitrarily ordered or directed the plaintiff to file a full and detailed statement and exhibit of the names of each and all customers who have contributed to said funds, together with the times and amounts of making their contributions thereto, or that the cost of preparing or making such detailed statement or exhibit, will not be less than $10,000.00, or that if plaintiff had kept the faith of its contract or agreement by keeping suitable records thereunto the cost should be otherwise than nominal, or that such expense is premature or unnecessary, or that such expense will never be necessary, or that under just or reasonable rates or charges for its said gas service said entire, or any part of said impounded fund should be ordered to be paid to the plaintiff, or belongs to the plaintiff, [fol. 70] or that it will never become necessary for plaintiff to prepare or file such statement, or that unless restrained by the orders of this court the Commission will undertake to enforce the said order of the impounded funds to the irreparable injury, or any damage of the plaintiff, or under the violation of its rights under the Constitution of the United States or under the Constitution of Kentucky.

That, upon the contrary, by said franchise contract and in Section 4 (E) thereof plaintiff Company agreed that it would "keep an accurate record of all sums paid in by all and any of its customers * * * and the Company on demand from the City, if so ordered by said Railroad Commission * * * shall file with said Railroad Commission * * * a full and detailed statement of the amounts, times and sums contributed by each customer to said funds"; that the order directing said statement to be filed was entered by said Railroad Commission at the time when under said franchise contract there could be no further impoundment of said funds with it, was entered upon demand from the defendant City, and was made for the purpose of providing a record upon which this Commission might distribute the said funds as and when, and if ever, distribution of all, or parts thereof might become necessary as under the terms of said franchise contract; and that the plaintiff Company specifically engaged and agreed to do as to said statement that

precise thing which it now seeks by injunction to prohibit its being compelled to do.

XII

That it is untrue and it denies that the ordering of the 45 cent rate without setting out in its order the value of plaintiff's property was arbitrary or in violation of the legal duties of said Commission, or of the rights of the plaintiff, or that by reason thereof the said order is void.

XIII

That it is untrue and they deny that a service charge of 75 cents or any sum, is reasonable or necessary in order to [fol. 71] avoid discriminatory rates, or that there are any consumers in Lexington who do not or would not consume, or pay for, enough gas to reimburse the plaintiff for the actual cost of rendering said service, or that under said flat rate of 45 cents the plaintiff would be compelled to furnish its gas service to more than forty, or any, percent of the entire number of its consumers in Lexington, or the Lexington district, at less than the actual cost of furnishing said service, or that by reason thereof the plaintiff would be deprived of its property without due process of law, or without just compensation, or in violation of any of its rights, or to the irreparable, or any injury or damage of the plaintiff, or that plaintiff has no plain or speedy or adequate remedy at law.

Upon the contrary defendants aver and state that plaintiff Company agreed in said franchise contract, and in Section 4(F) thereof, that it would not impose any meter charge during the terms of said contract.

Wherefore, having answered, the defendants jointly and severally pray:

(a) That it be determined that this Honorable Court be and is without jurisdiction of both or either the parties or the subject matter of this action.

(b) That the bill of complaint herein be dismissed for want of equity therein, and that the said bill be adjudged insufficient in fact to constitute a valid cause of action in equity.

(c) That said bill be dismissed; that the parties defendant may go hence without a day; and that they may have any and all and further relief to equity and good conscience belonging.

(d) That they have and recover of plaintiff their costs herein incurred.

Robt. H. Winn, D. C. Hunter, Attorneys for Defendants. J. W. Cammack, for Himself and for Defendant Railroad Commission and Moses R. Glenn, Oscar Vest and T. H. Lauhon, as Members Thereof.

[fol. 72] *Duly sworn to by James J. O'Brien and J. W. Cammack. Jurats omitted in printing.*

[fol. 73] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR INTERLOCUTORY INJUNCTION—Filed December 7, 1929

To His Excellency Flem D. Sampson, Governor of the Commonwealth of Kentucky, and the Honorable James W. Cammack, Attorney General of the Commonwealth of Kentucky;

In conformity with Section 266 of the United States Judicial Code you are hereby notified that the plaintiff in the above styled cause will on December 7th, at 10 o'clock A. M., in the chambers of the United States District Court for the Eastern District of Kentucky, at Lexington, Ky., move said Court for an interlocutory injunction.

Henry T. Duncan, D. L. Hazelrigg, Attorneys for Plaintiff.

The above notice is accepted this 2nd day of December, 1929.

F. D. Sampson, Governor of the Com. of Ky. J. W. Cammack, Atty. Genl. of the Com. of Ky.

IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT—Filed December 7, 1929

Comes the plaintiff, Central Kentucky Natural Gas Company, and, with leave of Court, files this its Amended Bill of Complaint, and amends its original Bill of Complaint as hereinafter set out:

[fol. 74] I

The plaintiff, amending Paragraph III and Paragraph VI of its Original Bill of Complaint, states that the said forty-five cent (45¢) rate ordered and entered by said defendants as set out in the Bill of Complaint was capricious, arbitrary and without any evidence, and without sufficient evidence to support the same, and by reason thereof the order of said Railroad Commission ordering said forty-five cent (45¢) rate is void and constitutes a denial to the plaintiff of equal protection of the law and of due process of law under the 14th Amendment to the Constitution of the United States.

The Plaintiff in proof and support of its allegations hereinbefore set out, files herewith a complete copy of the record and evidence and exhibits as made before said Railroad Commission and as hereinafter particularly described, which said exhibits are a true and complete copy of said record except as hereinafter set out, to-wit:

Exhibit "A", consisting of Volume 1 of the Transcript of Evidence and all of the Exhibits referred to therein and specifically enumerated in the index to said Volume.

Exhibit "B", consisting of Volume II of said Transcript of Evidence, together with all of the Exhibits therein mentioned and specifically enumerated in the index thereto.

Exhibit "C", consisting of Volumes III and IV of the Transcript of Evidence, together with all of the Exhibits therein mentioned and specifically enumerated in the index to each of said Volumes.

Exhibit "D", consisting of Volume V of the Transcript of Evidence, together with all of the Exhibits therein mentioned and specifically enumerated in the index to said Volume.

[fol. 75] Exhibit "E", consisting of Volume VI of the Transcript of Evidence, together with all of the Exhibits therein mentioned and specifically enumerated in the index to said Volume.

Exhibit "F", consisting of Volume VII of the Transcript of Evidence, together with all of the Exhibits therein mentioned and specifically enumerated in the index to said Volume, and also Volume VIII covering other and the final proceedings had before said Commission.

The plaintiff further says that the aforesaid Exhibits do not include a transcript of the pleadings filed with said Railroad Commission in said rate controversy, but that plaintiff will cause to be made a duly certified copy thereof and will hereafter file the same herein as a part hereof. The plaintiff makes each and all of the aforesaid Exhibits a part hereof the same as if fully set out herein.

II

The plaintiff for further cause of action against the defendants says that under Section 4 (A) of said franchise ordinance and contract the plaintiff acquired and has the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation. Plaintiff says that the rates promulgated by it and specifically set out by the plaintiff in Paragraph IX of its Bill of Complaint herein do not exceed and are in fact less than just and reasonable rates and charges and are rates and charges which the plaintiff has a right under its said contract to charge, receive and collect. Plaintiff says that the said forty-five cent (45¢) rate fixed and ordered by said Railroad Commission and the members thereof, defendants herein, constitutes an impairment of the plaintiff's contract right as hereinbefore set out and is in violation of the plaintiff's right secured and protected to it under Section 10, Article I of the Constitution of the United States, wherein it is provided that no state shall pass any law impairing the obligation of contracts, and by reason thereof [fol. 76] the said rate so fixed and ordered by said Railroad Commission is void.

Wherefore plaintiff prays as in its original Bill of Complaint; and further, that said rate and order so fixed and

entered by said Railroad Commission be adjudged void and in violation of the plaintiff's rights secured to it under the Constitution of the United States, as set out in said original Bill of Complaint, and as set out in this its Amended Bill of Complaint; and further, that the Court order and adjudge that the aforesaid rates promulgated by the plaintiff are just and reasonable rates under the terms of said franchise contract; and further, that the defendants, and each of them, be enjoined from entering any order changing or interfering with or modifying said rates promulgated by the plaintiff as aforesaid.

D. L. Hazelrigg, Chester J. Gerkin, L. K. Langdon,
Ernst, Cassett & Cottle, Allen, Botts & Duncan.

[fol. 77] IN UNITED STATES DISTRICT COURT

Before Moorman and Hickenlooper, Circuit Judges, and Dawson, District Judge

OPINION—Filed January 29, 1930

Per CURIAM:

The plaintiff, a Kentucky corporation, is engaged in the sale and distribution of natural gas in the City of Lexington, Kentucky, under a franchise granted to it by the city on February 25, 1927, under the provisions of Sections 163 and 164 of the Constitution of Kentucky. While the franchise goes into much detail as to the duties and obligations of the plaintiff in distributing and selling natural gas to consumers, it does not fix the rate to be charged for such service. Lexington, under the law of Kentucky, is a city of the second class. Charters of cities of the second class confer upon such cities no power to regulate the rates to be charged by public utilities furnishing service to their inhabitants. Chapter 61 of the Acts of the General Assembly of 1920 (now Sections 201e-1-26, Kentucky Statutes, Carroll's 1922 Edition) confers that power upon the Railroad Commission of Kentucky.

Section 4 of the franchise deals with the question of the rates to be charged by the plaintiff under its franchise. That section reads as follows:

"Sec. 4. (A) The Company shall have the right to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation.

(B) The Company shall, within two (2) days after the effective date of the franchise contract promulgate in writing the rates, charges and compensation which it may deem to be just and reasonable and which it proposes to charge for its gas service, and shall on said day file a copy thereof with the Mayor of the City of Lexington and shall also, on said day, file a copy thereof, and a copy of this Ordinance [fol. 78] with the Railroad Commission for the State of Kentucky.

(C) The Board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate for such gas service, but this declaration shall not be binding on the Company, nor shall anything herein contained ever restrict the City from contending for a lower, nor the Company from contending for a higher, nor the Railroad Commission of the State of Kentucky or other tribunal in the exercise of a lawful jurisdiction, nor any court in the exercise of its jurisdiction, from fixing a lower or higher rate than forty cents ($.40) per one thousand (1,000) cubic feet of gas.

(D) In the event the rates and charges promulgated and filed by the Company as aforesaid, shall, in the opinion of the City, be in excess of just and reasonable rates and charges than the City shall proceed before the Railroad Commission as provided in Sections 201c-1 to 201c-20 of the Kenfucky Statutes, and in such proceeding the Company shall assume the burden of proving that the rates and charges promulgated by it as aforesaid, are just and reasonable.

(E) Pending the final determination of such controversy and the fixing of just and reasonable rates and charges by said Railroad Commission and including any subsequent proceedings in court, the Company shall have the right to charge, receive and collect as temporary rates and charges not to exceed fifty cents ($.50) per one thousand (1,000) cubic feet of gas until the Company is furnishing gas through a pipe line of sufficient capacity, or (should the

purchaser hereof already have that ten inch line named in Section 23) then through two pipe lines, as provided in Section 23 of this ordinance, and after it is furnishing gas through a pipe line of sufficient capacity, or (should the purchaser hereof already have that ten inch line named in Section 23), then through two pipe lines as aforesaid, not to exceed sixty cents ($.60) per one thousand (1,000) cubic feet of gas; but provided that of the amount collected under such temporary rates the Company shall under the direction and control of said Railroad Commission, or of the court, impound ten cents ($.10) per one thousand (1,000) cubic feet until the final fixation of just and reasonable rates and charges as aforesaid. Upon final determination of just and reasonable rates and charges as aforesaid, the sums so impounded together with all interest accumulations thereon shall be distributed under the order of said [fol. 79] Commission, or court to the Company, or to its several customers, or in part to each, as the final determination may direct. If the Company during any part of the time prior to said final determination shall have collected sums including or other than those impounded, in excess of the rates and charges as finally determined, it shall then and thereupon repay said excess sums to the several customers who may have made such payments. The Company shall give to each customer a receipt for the amount paid by him pending the final determination of said suit or proceeding. It shall also keep an accurate record of all sums paid in by all and any of its customers under temporary rates and said records shall at all times be open to the City and to any customer as to his own contributions thereto; and the Company on demand from the City, if so ordered by said Railroad Commission, or other tribunal, or court, shall file with said Railroad Commission, or court, where said proceeding or suit may be pending, a full and detailed statement of the amounts, times and sums contributed by each customer to said funds. In addition to said temporary rates hereinabove provided for, the Company shall have the right to charge three cents ($.03) per one thousand (1,000) cubic feet, if the bill for service is not paid within ten (10) days after said bill is mailed or delivered to the customer.

(F) The rates, charges or compensation to be charged, demanded and collected by the Company as herein provided

shall be the total rates, charges and compensation charged, demanded and collected by the Company and they shall not be increased by any other charge or device of any kind or description. The rates, charges and compensation finally fixed and determined as provided in Sub-section (D) hereof shall continue in effect until modified, altered or changed under and pursuant to the provisions of the franchise, as hereinafter provided."

The bill discloses that in compliance with Section 4 (B) the plaintiff, within two days after the effective date of its franchise, promulgated in writing the rates proposed to be charged by it in rendering the service contemplated in the franchise, and that, as provided in Section 4 (D) of the franchise, the City of Lexington and S. B. Featherstone, an interested citizen, for himself and other consumers, filed [fol. 80] a complaint with the Railroad Commission, attacking the rates published by the plaintiff as excessive and extortionate, and asking that Commission to fix just and reasonable rates to be charged by the plaintiff. After notice to the plaintiff, a hearing was had, and on October 9, 1929, the Commission entered an order holding that the rates proposed to be charged by the plaintiff were unreasonable and extortionate and fixing forty-five cents (45¢) per one thousand (1,000) cubic feet, with an additional charge of three cents (3¢) per one thousand (1,000) cubic feet for overdue bills, as the lawful rate to be charged by the plaintiff. The order further provides that the rate thus fixed should be effective from January 28, 1927, which date is declared by the order to be the effective date of the franchise.

The fourth and fifth paragraphs of the Commission's order are as follows:

"Fourth. That the Central Kentucky Natural Gas Company filed herein, at the inception of this hearing and controversy, a copy of its ordinance-franchise whereunder it is operating in the City of Lexington; that said franchise-contract made certain stipulations and provisions about the fixation of rates under it, and that the Commission had conformed its procedure as near as might be to the agreements of the said franchise-contract. That it is provided in Section 4 (E) of said franchise-contract that pending

the final determination of just and reasonable rates and charges by this Commission and including any subsequent proceedings in Court, the defendant Company shall have the right to charge not to exceed sixty (60) cents per thousand cubic feet for its gas; and that in order to afford either side hereto the right, if it be so desired, to proceed in the courts with respect to such fixation of rates, the application of the forty-five cent rate hereby fixed is suspended for a period of thirty (30) days from the entry of this order; that if within said thirty day period either side shall have filed such proceeding in court, then the application of the forty-five cent rate hereby fixed shall be suspended until there be a final fixation in court of said rates, and subject to such modification, if any, of said rate as may [fol. 81] be fixed by said Court or Courts; but that if no such proceeding be filed in said time, then the said forty-five cent rate shall at once be put into force and effect.

That it be specifically recited and reserved, however, that no such suspension of the application of said forty-five cent rate shall affect the fact that it, or it as modified by the Courts, shall be effective from said 28th day of January, 1927.

Fifth. That as appears of record herein there have been impounded under the control and orders of the Commission, as provided in Section 4 (E) of said franchise, considerable sums of money out of the collections made by defendant Company as under the temporary rates by said section provided, which sums of money are to be distributed as under the orders of the Commission and as under the orders of the courts to which this controversy may be taken by the parties thereto. In consideration thereof it is ordered:

(a) That John H. Carter as Special Receiver do file within thirty days from this date a full report of all sums received by him, the dates of his such receipts, the expenses and allowances incident thereto, how said funds are now held and invested, and the net amount thereof in his hands as such Receiver.

(b) That upon motion of plaintiff said defendant company is ordered, within thirty days from this date, to file

with this Commission a full and detailed statement and exhibit of the names of each and all customers who have contributed to said funds, and the times and amounts of their several contributions thereto.

(c) That if there be instituted as within thirty days named in section four hereof, by either party, any suit to further try the rate controversy which is the subject of this proceeding, that the said impounded funds be retained in the custody and control of this commission, and not distributed until said Court proceedings have been fully determined; but that if said proceeding be not instituted in said thirty days, that this Commission will proceed to the distribution of said funds as may be proper in the premises.

That it be specifically reserved and recited, however, that nothing herein shall affect the right and obligation of the Commission to finally pay out said funds as under its [fol. 82] fixation of rates herein made, or as same may be modified by the courts, and as is provided in said franchise-contract."

The bill alleges that the rates fixed are confiscatory, and that therefore the order deprives the plaintiff of its property without due process of law, and contains allegations appropriate to invoke the powers of a court of equity. The prayer of the bill is that the rates fixed by the Commission be decreed to be confiscatory and in violation of the 14th Amendment to the Constitution of the United States; that the defendants be temporarily and permanently enjoined from enforcing or attempting to enforce such rates; that the Commission be temporarily and permanently enjoined from distributing the impounded funds referred to in the ordinance and in the order; that the Commission be enjoined from requiring the filing of the report directed to be filed in the fifth parargaph of the Commission's order, and that the Commission be enjoined from making reparation awards.

The case is now before us on motion for a temporary injunction, under Section 266 of the Judicial Code. The defendants have filed answer, putting in issue all the material allegations of the bill and specifically attacking

the jurisdiction of this court, and also attacking the bill because of want of equity therein.

The defendants' contention, that this cause is not within the jurisdiction of a Federal Court, is asserted from so many different angles, and the claims so overlap each other, that it is difficult to take hold of the real nub of their contention. Boiled down, it seems to be defendants' contention that in a rate controversy where there is no diversity of citizenship and no other federal question is made in the bill than the claim that the rate fixed by the rate-making body is confiscatory and deprives the plaintiff of his property without due process of law, the Federal District [fol. 83] Courts are without jurisdiction over the controversy, if the State statute under which the rate was fixed permits a judicial review in the State Courts on the question of confiscation or if the order, as in this case, suspends its operation pending judicial review, provided such review is sought within the time fixed by the order. It seems quite clear to us that the defendants have confused the question of jurisdiction with the question of the merits of the case. It is well settled that a complaint setting forth a substantial claim of a federal right, either under a federal statute or under the federal constitution, presents a case within the jurisdiction of the Federal Court, if the matter has reached the justiciable stage and if the jurisdictional amount is involved; and this is true, no matter how the court may ultimately decide the claimed federal right.

In the case of Binderup v. Pathe Exchange, 263 U. S. 291, the Supreme Court of the United States used this language in discussing the question of federal jurisdiction based upon an asserted federal right:

"Jurisdiction is the power to decide a justiciable controversy and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court, as a federal court; and this jurisdiction can not be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it. Jurisdiction, as dis-

tinguished from merits is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or, in other words, is plainly without color of merit."

[fol. 84] See also: Columbus Railway & Power Co. v. Columbus, 249 U. S. 399; Weiland v. Pioneer Irrigation Co., 259 U. S. 498; Newburyport Water Co. v. Newburyport, 193 U. S. 561; Matters v. Ryan, 249 U. S. 375; Flanders v. Coleman, 250 U. S. 223; Lovell v. Newman & Son, 227 U. S. 412; Louie v. United States, 254 U. S. 548; Hart v. Keith Exchange, 262 U. S. 271; The Fair v. Kohler Die Co., 228 U. S. 22; Siler v. L. & N. R. R., 213 U. S. 175; Nathan v. Rock Springs Distilling Co. (6th Cir.), 10 Fed. (2d.) 268.

Measured by the rule laid down and recognized in the foregoing, as well as in numerous other cases, the bill in this case is undoubtedly sufficient to invoke the jurisdiction of this court as a Federal Court. We shall therefore examine the defendants' contention that this court is without jurisdiction as though it were a motion to dismiss the bill on the ground that as a matter of law there has been no denial of due process in this case, inasmuch as the question of confiscation can be examined in the State Courts and as the order, by its terms, suspends its operation pending court review, provided same is taken within thirty days.

Neither Section 201e-1-26 of Kentucky Statutes, under which the Railroad Commission finds its authority for regulating the rates of the plaintiff, nor any other statute of Kentucky, provides for an appeal to the courts of the State by a utility company dissatisfied with the rates fixed by the Commission. The statutes of the State do not specifically provide for a proceeding in equity, in which the rates thus fixed may be attacked as being confiscatory, but that such right exists was recognized by the Court of Appeals of Kentucky in the case of Louisville & Nashville Railroad Co. v. Greenbrier Distillery Co., 170 Ky. 775. On the other hand, the statute under which the Commission [fol. 85] proceeded to fix plaintiff's rates does not attempt to deny the right of a utility company, in an appropriate proceeding, to have a court of competent jurisdiction try out the question of confiscation and exercise its own independent judgment as to the law and facts. Therefore, the statute under which the Railroad Commission proceeded

does not of itself deny due process of law, as was true in the case of Ohio Valley Co. v. Ven Avon Borough, 253 U. S. 287; Chicago, Milwaukee & St. Paul R. R. Co. v. Minnesota, 134 U. S. 418; Ohio Utilities Co. v. Public Utilities Commission of Ohio, 267 U. S. 359; Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340; Oklahoma Operating Co. v. Love, 252 U. S. 331.

The fact, however, that a State rate-fixing statute does not by its terms deny due process of law, by no means results in closing the door to a judicial inquiry as to whether or not a rate fixed by a rate-making body under the statute amounts to confiscation and denial of due process under the 14th Amendment. The statute may be valid when measured by the 14th Amendment, and yet the action of the rate-making body in fixing the rate complained of may be invalid under the Amendment. In such a case the moment the legislative act of fixing the rate has been completed and the rate-making body has the power and is under the duty to enforce the rate, unless restrained by court proceedings, the justiciable stage is reached, and irrespective of diversity of citizenship, the complaining utility, under Section 24 of the Judicial Code, may seek the protection of a Federal Court, even though the State law affords a like procedure in the State Courts. In either jurisdiction exactly the same question would be involved, viz: Is the rate so low as to be confiscatory, thereby resulting in depriving the plaintiff of his property without due [fol. 86] process of law? If the complaining party pursues the State remedy and the State Court, under the State law, is authorized to and does exercise its independent judgment on both the law and facts as to the question of confiscation and decides against the plaintiff, that is the end of the matter and the case is res judicata, unless on error to the Supreme Court it should be determined that the State Court acted arbitrarily or proceeded upon some fundamental error of law. But, as the question involved is a federal one, the plaintiff could have pursued his remedy in the first instance in the Federal Court. The State Court procedure provided by the State law is simply an alternative elective remedy. Railroad & Warehouse Commission of Minnesota v. Duluth Street Ry. Co., 273 U. S. 625; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196;

Bacon v. Rutland Railroad Co., 232 U. S. 134; Oklahoma Gas Light Co. v. Russell, 261 U. S. 290; Prendergast v. New York Telephone Co., 262 U. S. 43; Detroit & Mackinac Railroad Co. v. Michigan Railroad Commission, 203 Fed. 86; Detroit & Mackinac Railroad Co. v. Michigan Railroad Commission, 235 U. S. 402; Monroe Gas Light & Fuel Co. v. Michigan Public Utilities Commission, 292 Fed. 139; Van Wert Gas Light Co. v. Public Utilities Commission, 299 Fed. 670; Union Light Heat & Power Co. v. Railroad Commission, 17 Fed. (2d) 143.

The defendants have entirely overlooked the fact that the Supreme Court cases referred to in Judge Cochran's opinion in the case of Central Kentucky Natural Gas Co. v. Mt. Sterling, 32 Fed. (2d) 338, and other cases of a similar character, were either dealing with the question of the constitutionality of statutes when measured by the 14th Amendment, or with the question of whether or not a particular State Court procedure which had been followed by the complaining party had denied due process, and the [fol. 87] court in that case apparently fell into the same error. None of these cases is authority in support of defendants' contention that when the State law permits a judicial review of a rate fixed by a rate-making body, that fact, as a matter of law, is such due process as to deny a Federal Court the power to hear and determine the question of confiscation in a suit brought in such court upon completion of the rate-making act.

Defendants point to the fourth paragraph of the Railroad Commission's order in support of their contention that the order fixing the forty-five cent rate does not amount to a taking of plaintiff's property without due process of law. This contention is based on the provision in that paragraph of the order suspending the forty-five cent rate for a period of thirty days after the entry of the order, and, if a proceeding is instituted in court within that time, for such additional time as the matter is pending in court. It is argued that as the operation of the order is thus suspended pending a judicial determination of the question of confiscation, there has been and can be no taking without due process. The trouble with this contention is that the defendants entirely ignore the plight the plaintiff found itself in upon entry of the order complained. Plaintiff was then faced with the necessity of making a de-

cision as to whether it should or should not resist the order in a judicial proceeding. If it did not resist, then by the terms of the order it became operative at the end of thirty days. So from the very date of its entry the Railroad Commission was under the duty of enforcing the order at the end of thirty days, if court proceedings had not been instituted; and by the express language of the order itself, the Commission was threatening so to do.

It must not be forgotten that the prohibitions contained in the 14th Amendment apply to each of the three branches of the State government. As pointed out in the case of Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 233:

[fol. 88] "The prohibitions of the amendment refer to all the instrumentalities of the State—to its legislative, executive and judicial authorities, and therefore whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State violates the constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State."

Therefore, if the rate fixed by the Commission is confiscatory, and its observance had been enforced by the Commission, such enforcement would have resulted in depriving the plaintiff of its property without due process of law, irrespective of the fact that the plaintiff might have appealed to a State Court for judicial determination of the question of confiscation. If, then, its enforcement by the Railroad Commission would deprive the plaintiff of its property without due process of law, undoubtedly such threatened enforcement justified a resort to a court of equity to prevent such confiscation, provided the other necessary grounds for equitable jurisdiction exist. Such a suit would present solely a controversy arising under the Constitution of the United States, of which District Courts are given jurisdiction under Section 24 of the Judicial Code.

It is rather hesitatingly suggested by the defendants that the action of the Railroad Commission complained of can not be considered as a denial by the State of due process, for the reason that the Railroad Commission, by virtue of the agreement set forth in Section 4 of the franchise ordi-

nance, acted as arbitrators chosen by the parties to fix the rate, and not as a State agency vested by law with the power to fix plaintiff's rates. A most superficial reading of the franchise, however, discloses the fallacy of this contention. The provisions found in Section 4 of the ordinance are the very anthithesis of an arbitration agreement. Instead of indicating an intention to be bound by the action of the [fol. 89] Railroad Commission, as would have been the case in an arbitration agreement, there is specifically reserved to each party the right to resort to the courts to test the legality of the rate fixed. At most, the franchise simply expresses the agreement of the parties that the rate to be charged may be fixed and determined in the manner provided by State law. Such an agreement can not be twisted into an undertaking on the part of the plaintiff to abide by the action of the Commission, if it conceives its federal constitutional rights to be violated by the order, nor into an agreement to seek redress for such wrong, if any, in the State courts. See Railroad & Warehouse Commission of Minnesota v. Duluth Street Ry. Co., supra.

We must hold, therefore, that this court has jurisdiction of the controversy, and that the mere fact that the State Courts are open to the plaintiff to have judicially determined the question of confiscation does not prevent the order of the Railroad Commission and its threatened enforcement from being violative of the 14th Amendment, if, in fact, the rate fixed is confiscatory.

Defendants contend, perhaps not strenuously, that there is no equity in the bill. The allegations therein as to the penalties which might have been inflicted, had the plaintiff disregarded the order fixing the rates and taken no steps to enjoin its enforcement, and the danger of numerous suits by customers for overcharges had no such steps been taken, are sufficient to support equitable jurisdiction.

In view of the conclusions herein announced, it becomes our duty to hear and determine de novo the questions of fact and law as to whether or not the rate complained of is confiscatory. In such a hearing we are not confined to [fol. 90] the testimony heard before the Commission, as we probably would be had the Commission's order been attacked solely on the ground that it was arbitrary and capricious. Of course, we are not to be understood as

holding that the parties may not, by agreement, try the case before us upon the same evidence heard by the Commission. The conclusions herein announced, however, do not require that the temporary injunction sought shall be granted to the full extent asked by the plaintiff.

By the express provisions of the franchise ordinance the plaintiff agreed to the rates which it would charge during the pendency of any suit brought to judicially determine the lawfulness of the rate fixed by the Commission, and the Commission's order recognizes and respects that agreement. The plaintiff is in no position, therefore, to ask the assistance of this court in violating such agreement. Neither is the plaintiff entitled to a temporary injunction to prevent the enforcement of the forty-five cent rate, nor to prevent distribution of the impounded funds, nor to prevent reparation awards by the Commission. The order in terms suspends all of these matters so long as the question of the rate is pending in court.

Section 4 of the franchise ordinance, after providing for the charges which may be made pending investigation by the Railroad Commission and any subsequent proceeding in court, and for the impounding of ten cents per thousand cubic feet of such charge, further provides:

"It shall also keep an accurate record of all sums paid in by all and any of its customers under temporary rates and said records shall at all times be open to the city and to any customer as to his own contributions thereto; and the company, on demand from the city, if so ordered by said Railroad Commission or other tribunal, or court, shall file with said Railroad Commission or court where said proceedings or suit may be pending, a full and detailed statement of the amounts, times and sums contributed by each customer to said funds."

[fol. 91] By virtue of this provision the Railroad Commission in its order directed the plaintiff, within thirty days, to file with the Commission a full and detailed statement and exhibit of the names of each and all customers who have contributed to said funds, and the times and amounts of their several contributions thereto. Before the expiration of the thirty day period this suit was filed, and by the terms of the franchise ordinance such a report, if

required to be filed, should be filed with this court, and not with with the Railroad Commission. No good purpose could be served at this time in requiring the plaintiff to go to the expense of filing such a report with the Railroad Commission. If, ultimately, it should be determined that the rate fixed is confiscatory, the plaintiff would have been put to the expense of compiling and filing such a report when there was no necessity therefor. For this reason a temporary injunction may issue to the extent of prohibiting the Commission from requiring the filing of such report.

An order conforming to the views herein expressed may be prepared by counsel and submitted for entry.

Chas. H. Moorman, Smith Hickenlooper, C. I. Dawson.

January 28, 1930.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING INTERLOCUTORY INJUNCTION—Entered March 8, 1930

This cause having been submitted on the motion of the defendants to dismiss the bill of complaint for want of jurisdiction, and also on the motion of the defendants to [fol. 92] dismiss the bill of complaint for want of equity, and also on the motion of the plaintiff for an interlocutory injunction, and the Court being now advised it is ordered as follows:

1. The motion of defendants to dismiss the bill for want of jurisdiction is overruled, to which ruling the defendants except.

2. The motion of the defendants to dismiss the bill for want of equity is overruled, to which ruling the defendants except.

3. The motion of the plaintiff for an interlocutory injunction is allowed and granted to the following extent, to-wit: that the defendant, Railroad Commission of Kentucky, and the individual defendants, members of said Railroad Commission, be and they are hereby enjoined and restrained pending the further orders of this Court herein

from enforcing or instituting any proceedings for the purpose of enforcing the order of said Commission directing and ordering the plaintiff herein to file with the said Commission a detailed statement and exhibit of the names of each and all customers who have contributed to the impounded funds, and the times and amounts of their several contributions thereto, to all of which the defendants object and except.

4. The motion of the plaintiff for a temporary injunction is in all other respects, except as hereinbefore allowed and granted, overruled, to which ruling the plaintiff objects and excepts.

5. That save as to so much of the temporary restraining order entered herein by the Hon. A. M. J. Cochran, Judge, on the 19th day of October, 1929, as is continued in force by the third numbered paragraph of this order, the said temporary restraining order is now set aside and vacated.

6. It appearing to the Court from the record herein that until the final judgment of this Court the plaintiff is entitled to collect a temporary rate of sixty cents per thousand cubic feet, but as provided by the franchise contract, is required to impound ten cents per thousand cubic feet [fol. 93] out of said temporary rate to be held subject to the orders of this Court, and the said plaintiff, Central Kentucky Natural Gas Company, having filed its motion herein asking that the Court appoint some person to receive the impounded funds which have accumulated since the last impoundment made by said plaintiff in the proceeding before the Railroad Commission of Kentucky, and the sums hereafter collected and required to be impounded under said contract, and to fix the powers and duties of such receiver in the handling of said impounded funds, and the Court being advised, it is now ordered and adjudged as follows:

(a) That J. H. Carter of Lexington, Kentucky, be, and he is now hereby appointed as special receiver of this Court to receive, hold and disburse, subject and pursuant to the orders of this Court, the funds required to be impounded from time to time as provided in the franchise contract between the Central Kentucky Natural Gas Company and

the City of Lexington. Said receiver will qualify by taking an oath in this Court for the faithful performance and discharge of his duties, and will be required to execute bond with good surety thereon in the sum of $10,000.00, for the safe custody and distribution under the orders of the Court of the funds coming to his hands as such receiver.

* * * * * * *

12. The plaintiff, Central Kentucky Natural Gas Company, is ordered and directed to pay over to said special receiver, out of the temporary rate of sixty cents collected by it under its franchise contract, the sum of ten cents per thousand cubic feet for all natural gas furnished by said Company and collected for by it from its Lexington distributing system, including amounts collected since the last impoundment made by said plaintiff with the custodian of funds appointed by the Railroad Commission of Kentucky, and including all collections hereafter made by it under said temporary rate, said Company is further di- [fols. 94-96] rected to make said payments to said special receiver at least once each month, and on or before the 12th day of each month, but said plaintiff may make more frequent payments to said special receiver at its option.

13. Said plaintiff is further ordered and directed to give to each customer a receipt for the amount paid by him pending the final judgment of this Court; and said Company is directed to keep an accurate record of all sums paid in by each and all of its customers under said temporary rate; and said record so kept by said Company shall at all times be open for inspection to the City of Lexington, and to any customer as to such customer's contributions thereto, and to the attorneys, officials and agents for said City of Lexington, or such customer. Said Company is further required, whenever ordered by this Court, either upon the Court's own motion, or the motion of any party to this cause, to file in court a statement, or statements as the Court may require, showing the names of each and all of its customers who have contributed to said fund, and the amount paid in by each customer, such statement, or statements to be made up in orderly bookkeeping form.

14. The temporary injunction herein granted shall not be effective unless and until the plaintiff has executed bond in the usual form in the sum of $5,000.00, with surety to be approved by the clerk of this court.

Chas. H. Moorman, Smith Hickenlooper, Circuit Judges. C. I. Dawson, Dist. Judge.

[fol. 97] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Entered March 24, 1930

By agreement of parties herein it is ordered as follows:

* * * * * * *

2. That this cause be now submitted for final judgment on the pleadings herein and on a duly or properly attested or certified copy of the record including briefs, in the case of City of Lexington, and others, vs. Central Kentucky Natural Gas Company before the Railroad Commission of Kentucky, and that the testimony and exhibits introduced and offered by the parties, as shown by the transcript thereof, before said Railroad Commission shall be considered and used as the testimony and exhibits offered on behalf of the parties hereto, subject to objections for competency and relevancy to be made and heard upon the trial, but provided that the avowals made by parties on behalf of witnesses whose testimony was offered, as shown by said transcript of the testimony before the Railroad Commission, shall be considered as the testimony of said witnesses subject to objections thereto on the ground of competency and relevancy, to be made and heard upon the trial.

* * * * * * *

[fol. 98] Chas H. Moorman, Smith Hickenlooper, Circuit Judges. C. I. Dawson, Dist. Judge.

IN UNITED STATES DISTRICT COURT

ORDER AS TO RECORD—Entered July 21, 1930

Now comes the plaintiff, Central Kentucky Natural Gas Company, and files herein in triplicate sets, copies of the record and proceedings, the testimony and the exhibits had,

taken and filed before the Railroad Commission of the State of Kentucky, in the cause of the City of Lexington, et al., vs. Central Kentucky Natural Gas Company, and upon which this action has heretofore been submitted for final judgment.

Each of said triplicate sets consists of seven (7) large red envelopes, and the envelopes composing each set are respectively designated as "R-1," "R-2," "R-3"; and the envelopes in each set are respectively designated as Exhibit "A," Exhibit "B," Exhibit "C," Exhibit "D," Exhibit "E" and Exhibit "F."

Exhibit "A" in each of said triplicate sets contains the following portion of said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

[fol. 99] Table of Contents—Exhibit—Envelope "A"

1. Pleadings, petitions, motions and orders taken from files and order books Kentucky Railroad Commission.
2. Vol. 1 Transcript of Evidence for Defendant.
3. Company Exhibit No. 1—Valuation of Central Kentucky Natural Gas Company and Lexington Utilities Company—Ford, Bacon and Davis, as of Dec. 31, 1926.
4. Company Exhibit No. 2—Valuation of property devoted to natural gas service in urban and suburban district of Lexington—Ford, Bacon and Davis, as of December 31, 1926.
5. Company Exhibit No. 3—Valuation as of December 31, 1926, adjusted to December 31, 1927. Ford, Bacon and Davis.
6. Company Exhibit No. 4—Net Revenue available for return on property Central Kentucky Natural Gas Company and Lexington Utilities Company—based on operating reports—for years 1922 to 1926, inclusive, Ford, Bacon and Davis.
7. Company Exhibit No. 5—Rate of return on property Central Kentucky Natural Gas Company and Lexington Utilities Company—Ford, Bacon and Davis.
8. Company Exhibit No. 6—Estimate of net return available with first rate schedule proposed by Company—(Ford, Bacon and Davis).

9. Company Exhibit No. 7—Estimated rate of return on basis of first rate proposed by Company—Ford, Bacon and Davis.

The red envelope in each of said triplicate sets, designated as Exhibit "B," contains the following portion of said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

Table of Contents—Exhibit—Envelope "B"

1. Vol. II Transcript of Evidence for Defendant.
2. Company Exhibit No. 8—Net return available based on operating reports for the year 1927.
[fol. 100] 3. Exhibits—filed by Company—Nos. 10 to 25 inclusive—Contracts.
4. Company Exhibit No. 26—Von Gemmigen detailed report of pipe conditions.

The red envelope in each of said triplicate sets, designated as Exhibit "C," contains the following portion of said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

Table of Contents—Exhibit—Envelope "C"

1. Vol. III—Transcript of Evidence ~~for~~ Defendant.
2. Copy Von Gemmigen Map—Lexington pipe inspections.
3. Copy Von Gemmigen Maps—a, b, c, d—main line inspections.
4. Vol. IV Transcript of Evidence for defendant.
5. Kimball Exhibit No. 9—Estimated Revenue based on second rate schedule proposed by Company.
6. Kimball Exhibit No. 10—Letter from Republic Iron and Steel Company to Ford, Bacon and Davis.
7. Balance Sheets—Central Kentucky Natural Gas Company, as of December 31, 1926 and December 31, 1927.
8. Supplemental Transcript consisting of a letter from T. J. Tonkin to Moses R. Glenn, Chairman, Railroad Commission, with Exhibits, T. J. Tonkin, Jr., "B," "C," "D," "E" and "F" attached.

The red envelope in each of said triplicate sets, designated as Exhibit "D," contains the following portion of

said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

Table of Contents—Exhibit—Envelope "D"

1. Vol. V—Transcript of Evidence for Complainant.
[fol. 101] 2. Jirgal Exhibit No. 1—Report original cost plant and property—Central Kentucky Natural Gas Company.
3. Jirgal Exhibit No. 2—Cost of reproduction of physical properties as of December 31, 1926—adjusted to 1926 price level.
4. Beckner No. 1—Gas Reserves Eastern Kentucky.
5. Carter Exhibit No. 1—Inventory and appraisal as of Dec. 31, 1926, Central Kentucky Natural Gas Company.
6. Carter Exhibit No 2—Inventory and appraisal as of Dec. 31, 1926, Lexington Utilities Company.
7. Carter Exhibit No. 3—Valuation property devoted to service—urban and suburban district—Central Kentucky Natural Gas Company as of December 31, 1926.
8. Carter Exhibit No. 4—Valuation property devoted to service in Lexington—Lexington Utilities Company, as of December 31, 1926.
9. Carter Exhibit No. 5—Valuation as of December 31, 1926, adjusted to Dec. 31, 1927—Central Kentucky Natural Gas Company.
10. Carter Exhibit No. 6—Valuation as of December 31, 1926, adjusted to December 31, 1927—Lexington Utilities Company.
11. Carter Exhibit No. 7—Rate of Return—Lexington District—using various values for property considering Central Kentucky Natural Gas Company and rental paid Lexington Utilities Company.
12. Carter Exhibit No. 8—Rate of Return—Lexington District—using various values of property, Central Kentucky Natural Gas Company and Lexington Utilities Company as part of integer.
13. Carter Exhibit No. 9—Comparison of summaries of appraisal of Central Kentucky Natural Gas Company and Lexington Utilities Company—as of December 31, 1926.
14. Supplemental Transcript of Evidence—Consisting of letter from Columbia Gas and Electric Corporation to Se-

curity Trust Company (Holly v. Stevenson) to which is attached copy of letter from Central Kentucky Natural Gas Company to its stockholders dated November 17, 1927; copy of letter from Pittsburg Trust Company to stockholders Central Kentucky Natural Gas Company; copy form letter [fol. 102] sent Stockholders with reference to plan of exchange of stock Central Kentucky Natural Gas Company (See Vol. V—Transcript of Evidence, page 2).

15. Copy Magazine "Hail Columbia" with maps showing location Central Kentucky System with reference to Columbia System.

The red envelope in each of said triplicate sets, designated as Exhibit "E", contains the following portion of said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

Table of Contents—Exhibit—Envelope "E"

1. Vol. VI Transcript of Evidence for Complainant.
2. Carter Exhibit No. 10—Rate of Return for Lexington District.
3. Copy Lexington Gas Franchise.
4. Carter Maps—Nos. 1 to 5 (inclusive) showing pipe inspections on main line.
5. Carter Maps—Nos. 6 and 7—Extensions of same.
6. Carter Exhibit No. 12—Pipe inspections—Central Ky. Natural Gas Company and Lexington Utilities Company.
7. Carter Exhibit No. 13 a-b-c—Photostatic copies original billing of main line pipe—purchased by Central Company from Mark Mfg. Co.
8. Beckner—Corrected Exhibit (No. 1).

The red envelope in each of said triplicate sets, designated as Exhibit "F", contains the following portion of said record, as shown by a typewritten table of contents endorsed on the back thereof, as follows, to-wit:

Table of Contents—Exhibit—Envelope "F"

1. Vol. VII—Transcript of Evidence in rebuttal for Defendant.

2. Carter—Supplemental and Revised Exhibits Nos. 1 to 10 inclusive.

3. Exhibit "Mt. Sterling" (Copy of Mt. Sterling franchise).

[fols. 103-105] 4. Exhibit "Owensboro" (Copy deed conveying natural gas in Owensboro, Ky. field).

5. Yunker's No. 1—Map—Gas Reserves in Eastern Kentucky.

6. T. J. Tonkin, Jr., Exhibits Nos. 1 to 7—Subject: Service Charge.

7. Vol. VIII—Transcript—Consisting of proceeding before Railroad Commission on final order.

The foregoing records so filed, are filed as constituting the complete record made and had before said Railroad Commission, and the parties hereto stipulate that said record so filed constitutes the entire record; but further stipulate that in the event it should develop that any portion of said record is missing and either of the parties desire to supply the same, such missing portion of said record may be supplied.

Chas. H. Moorman, Circuit Judge. Smith Hickenlooper, Circuit Judge. C. I. Dawson, District Judge.

[fol. 106] IN UNITED STATES DISTRICT COURT

Before Moorman and Hickenlooper, Circuit Judges, and Dawson, District Judge

OPINION—Filed July 11, 1932

Per CURIAM:

The plaintiff in this cause seeks an injunction, enjoining the enforcement of an order of the Railroad Commission fixing a flat rate of 45 cents per thousand cubic feet as a just and reasonable rate for the natural gas service which the plaintiff furnishes to consumers of natural gas in the city of Lexington. The case is submitted on the evidence heard by the Railroad Commission. Much of this evi-

dence is conjectural. In so far as it relates to the capital value of that part of the plaintiff's plant allocable to Lexington it is directed to December 31, 1926. We are asked to determine the capital base as of that date.

The several estimates of value of the property differ widely. Kimball, a witness for the plaintiff, fixed the reproduction value new, less depreciation, of that part of the Central Kentucky Natural Gas Company plant allocable to Lexington at $2,028,069. Carter, a witness for the defendant, fixed the value at $1,189,489. Jirgal found the historic cost of the entire plant to be $2,653,035, without giving consideration to any going concern value and some other items, such as gas pumped and stored in the Menifee field and working capital.

It is apparent from an examination of the figures of each of the three witnesses referred to that no one of them proceeded in all particulars upon the correct basis. Kimball's estimates of overhead, costs of financing, etc., appear to us to be entirely too high. On the other hand, [fol. 107] Carter left out altogether some of the items that should be considered in arriving at a fair reproduction cost new of a utility plant for rate-making purposes. The proofs show that about 55.1% of the entire value should be allocated to Lexington. Allocating to Lexington this percentage, that part of the historic cost of the property actually owned by the plaintiff and allocable to Lexington would be $1,461,822, exclusive of going concern value and some other minor items not reflected by the books of the company. It appears, too, in the proofs that in 1928 the Columbia Gas & Electric Company bought 1199/1200 of the entire capital stock of the Central-Kentucky Natural Gas Company. The price paid was at the rate of $48 per share, or a total of $2,880,000. This was a voluntary sale, and the purchasers obviously were informed of the values represented by the property. Both parties were more or less expert on the value of such properties. Proceeding on this sales basis, the value of that part of the plaintiff's plant allocable to Lexington in the early part of 1928 would be $1,586,880.

Counsel devote considerable space in their briefs to the Menifee field. The plaintiff claims that this field had a value of $2,000,000 as a storage plant. We are not impressed with this claim, nor can we attach great importance

to much of plaintiff's evidence as to the reproduction cost new of the main transmission line. This latter evidence in some of its aspects is purely conjectural. Nor can any useful purpose be served by discussing the conflicting statements of the witnesses as to the several items that ordinarily go to make up capital value. Taking into consideration all the evidence touching the different methods of arriving at such value, we find that the sum of $1,586,880 represents a fair and just value of that part of the plant actually owned by plaintiff and allocable to Lexington.

[fol. 108] Another item to be considered in connection with the capital base is the distributing system in the City of Lexington. This system does not belong to the plaintiff. It is the property of the Lexington Utilities Company. The plaintiff has leased it from the Lexington Utilities Company and is using it exclusively in the distribution of gas in the city. There is a dispute as to whether the fair value of this property shall be considered as a part of the rate base, or its value be disregarded and the rental paid for its use by the plaintiff be treated as a part of the expense of operation. Probably a correct application of the principles of rate-making would require that the latter alternative be adopted. An analysis of the result in the way of returns to the company, whether we acept the valuation of the Lexington Utilities plant, as fixed by Carter or as fixed by Kimball, discloses that it would be more advantageous to the consumers in Lexington to treat the value of the distributing system as a part of the rate base, and disregard the rental contract between the two companies, than it would be to treat the sum required to be paid under the rental contract as operating expense and disregard the valuation in the rate base. Inasmuch as the plaintiff is insisting that this be done, there can be no objection to adopting this method. A careful consideration of the figures of Kimball and Carter and of their testimony with reference to the fair reproduction cost of the Lexington Utilities property as of December 31, 1926, as depreciated to its then condition, convinces us that we should accept the value of $611,227 fixed by Kimball, especially as this does not take into consideration any going concern value. This makes the rate base, as of December 31, 1926, which is the date as of which both parties desire the valua-

tion to be fixed, $1,586,880 plus $611,227, or a total of $2,198,107.

[fol. 109] In 1912 a contract was made between the United Fuel Gas Company and the Central Kentucky Natural Gas Company, generally by the terms of which the United Fuel should sell and deliver gas to the Central Kentucky Gas, at a price equal to one-half of the retail price realized by the latter company. This contract was for a period of twenty years and was in full force and effect on December 31, 1926. The Columbia Gas & Electric Company owns all of the stock of the United Fuel Gas Company, and, as heretofore indicated, in the early part of 1928 it acquired substantially all the stock of the Central Kentucky Natural Gas Company. The city contends that by reason of this fact the plaintiff is not entitled to charge as an expense the price paid for gas under its contract with the United Fuel without evidence of its reasonableness. We cannot agree with this contention. On this point the case is unlike Western Distributing Co. v. Pub. Service Com. Kansas, 285 U. S. 119, 124. Here the contract was made at arm's length, and so far as the record discloses, the United Fuel and the Central Kentucky Natural Gas Company had no relation to each other by reason of common ownership of stock at that time. That relationship did not exist prior to 1928, and inasmuch as we are asked to fix the rate base and determine the income as of December 31, 1926, we are of opinion that for such purpose we should accept the contract price of gas purchased from the United Fuel as part of the cost of operation.

The plaintiff's records show that the net operating revenues allocated to the Lexington district, disregarding rental payments to the Lexington Utilities Company under the contract heretofore referred to, and before any deduction for taxes, amortization, depletion, extraordinary maintenance, contingencies, interest and dividends, at a 40 cent rate were—

[fol. 110]

For 1922	$170,547.00
1923	217,168.00
1924	209,767.00
1925	201,645.00
1926	225,997.00

and that the average from 1922 to 1926, both inclusive, was $205,025, and that the average for the years 1924 to 1926, both inclusive, was $212,470, and that at a 50 cent rate for 1926 the net operating revenue before such deductions was $318,409. After making the deductions claimed by the plaintiff on account of amortization, depletion, extraordinary maintenance, and contingencies, the net income available for interest and dividends at a 40 cent rate was as follows:

1922	$21,590.00
1923	68,431.00
1924	59,102.00
1925	48,239.00
1926	74,702.00

and the average from 1922 to 1926, both inclusive, was $54,413, and from 1924 to 1926, both inclusive, was $60,681, and for 1926 at a 50 cent rate the net income available for interest and dividends was $156,724.

Plaintiff's exhibit on the actual operation for 1927 on the basis of a 40 cent rate for eleven months and a 50 cent rate for the month of December shows the net operating revenue before the deductions heretofore referred to of $169,695, and that after making such deductions the net income available for interest and dividends was $23,815, and for the same year 1927, on the basis of a 50 cent rate for the first eleven months and a 60 cent rate for December, the plaintiff claims that there was an operating revenue before the deductions referred to of $245,850, and a net available for interest and dividends after such deduction of $98,307.

Plaintiff also makes an estimate of what income would be produced in a normal year by applying the first schedule [fol. 111] of 60 cents, which was promulgated in accordance with the ordinance and which was reviewed and held exorbitant by the Railroad Commission. While plaintiff shows a total revenue of $701,276 under such schedule, yet strange as it may seem, by some process of reasoning it shows a net operating revenue before the deduction of taxes, etc., on the 60 cent rate of less than was actually received in 1927 by the application of a 50 cent rate for eleven months and a 60 cent rate for one month. It is equally strange that plaintiff shows a net income available

for interest and dividends under the first schedule for an assumed normal year of only $73,013, as against $98,307 for the year 1927, where a 50 cent rate was applied for eleven months of the year and a 60 cent rate for only one month. We cannot accept the soundness of any such figures.

Furthermore, in our opinion the plaintiff has made many unauthorized deductions from gross revenue. For the purpose of amortizing and depleting that part of its plant allocable to Lexington, plaintiff has made an annual deduction of $82,477. That figure is based, of course, upon plaintiff's valuation, and, as explained by Mr. Kimball, is also based upon the theory that the entire investment should be recovered in twenty years. It was arrived at by determining what sum set aside annually and compounded at 3½% would return the capital investment in twenty years. We think the interest rate used is too low. It should, we think, be a 4%, as there should be no difficulty in so investing the sinking fund intended to retire the capital investment so as to produce 4%. On this basis, and treating the value to be recovered at $1,586,880 (Central Kentucky Company), the annual amount necessary to be set aside to permit such recovery in twenty years would be in the [fol. 112] neighborhood of $54,000, with no allowance whatever for salvage. We are satisfied that when salvage is taken into account, $50,000 annually is ample to return to the plaintiff at the end of twenty years that portion of the value of its property not recoverable as salvage. This would increase plaintiff's net income in all the figures above given to the extent of $32,477 for each of the years referred to.

Plaintiff has allowed as a deduction for amortization and depletion of the Lexington Utilities Company plant $12,191 annually. This was arrived at by using the same method as was used in arriving at the amortization figure for the Central Kentucky Company, except that plaintiff estimated that there would be substantially a 50% salvage on the property of the Lexington Utilities Company. On that basis, and using the 4% interest rate instead of 3½, the sum allowed annually for amortization for the Lexington Utilities Company would be $10,263 instead of $12,191, or a difference of $1,928, and the annual net income figure should be increased by this amount.

Plaintiff has allowed as a further deduction from income the annual sum of $12,878 on account of extraordinary maintenance for that part of the Central Kentucky plant allocable to Lexington. This sum was based upon a total value of $2,028,056. We think it is fair that this sum should be reduced in proportion to the difference between that valuation and the valuation of $1,586,880 as heretofore fixed. This would roughly be a reduction of one-fifth of $12,878, leaving in round numbers $10,000 annually for extraordinary maintenance for that part of the Central Kentucky plant allocable to Lexington. This would make $2,878 additional to be added to net income available for interest and dividends.

[fol. 113] Plaintiff has allowed for extraordinary maintenance $8,384 annually for the Lexington Utilities Company plant. We think this is unreasonably large. Certainly $5,000 should be sufficient in this respect. This would leave $3,384 additional income available for interest and dividends.

Plaintiff has allowed for contingencies for the Central Kentucky Natural Gas property an annual additional sum of $5,600. We do not think this should be allowed. The extraordinary maintenance deduction heretofore allowed is sufficient to cover what was intended to be covered by the item of contingencies. This will add an additional $5,600 income available annually for interest and dividends.

Adding these sums together furnishes an additional $46,267 annually as income available for interest and dividends. This sum, added to the income of $156,724 which plaintiff admits would have been available in 1926 for the payment of interest and dividends by the application of a 50 cent rate to the business done that year, would make a total income available for interest and dividends for that year of $202,991, which would be approximately a ten per cent return on the total valuation of $2,198,107.

Plaintiff's figures show that by applying the 40 cent rate to the 1926 business, there was available for interest and dividends $74,702. Adding $46,267 to this sum would give $120,969 as income available for interest and dividends in 1926 on the 40 cent rate. This would be slightly less than 6% on the total valuation found by us. If plaintiff's net income as given by it under the 40 cent rate for all years from 1922 to 1925 inclusive is increased by $46,267, we

would still get less than 6% return on this valuation. It is in the record that 1926 had an unusually cold winter, and [fol. 114] the large income for that year is explained by the plaintiff on that ground. It is admitted, however, that 1927 had an unusually mild winter, and with a 50 cent rate applied for eleven months of that year and 60 cents for one month, plaintiff shows a net return available for interest and dividends of $98,307. When this figure is increased by the sum of $46,267 we have $144,574 available for interest and dividends obtained by the application of a 50 cent rate for the entire twelve months of 1927 except the month of December. This result may be reasonably accepted, it seems to us, as a fair prophecy of a minimum return during a normal year by the application of a 50 cent rate. This sum produces a return of substantially 7% on the valuation of $2,198,107. It seems apparent to us that a 50 cent rate may be reasonably expected to earn this return for the plaintiff.

Concededly, what may be a fair return for one utility may be inadequate for another. United Railway v. West, 280 U. S. 234, 249. Under the proofs in this case we think a 7% rate of return is an adequate return on the plaintiff's investment. The plan adopted by us provides for the return to the plaintiff of its entire capital by amortization in a period of twenty years. It permits the deduction of the necessary expenses incurred in ordinary maintenance. It furthermore sets up an annual reserve to cover extraordinary maintenance and repairs. It permits the deduction of all taxes, including the Federal income tax. In view of this assurance of the return of the entire principal in twenty years, and the allowances in the meantime of adequate amounts for necessary expenses and extraordinary maintenance, it seems to us that plaintiff's capital is about as safely invested as it can be under modern conditions. We therefore hold that a 7% return on the investment is adequate.

[fols. 115–121] We are not determining future values, nor do we undertake to fix a rate of return applicable to a changed valuation or to any future situation involving changes in the consumption of gas, cost of operation and the like. We think, however, that the 45 cent rate promulgated by the Commission, as applicable to the date herein involved, December 31, 1926, is inadequate and must be

regarded as confiscatory. An order of injunction, enjoining the enforcement of the Commission's order, will accordingly be issued, provided the plaintiff file in this court in ten days a written request that this court order all funds in excess of the 50 cent rate impounded under its orders distributed to and among the consumers of the plaintiff in Lexington entitled thereto, and provided further that it file in this court within ten days satisfactory evidence that it has made written request of the Railroad Commission of Kentucky and of the Fayette Circuit Court of Kentucky that those tribunals make like orders of distribution of all funds in excess of the fifty cent rate which are impounded and held under their orders.

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* * * * * * *

[fol. 122] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING PETITION FOR MODIFICATION AND/OR AMENDMENT OF OPINION—Entered July 29, 1932

Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's property allocable to Lexington as of December 31, 1926, and determine whether the rate established by the Commission afforded a reasonable return on such values as of said date. The court having acted upon such requests and made its findings and determinations as of said date, the plaintiff now asks the court to make further findings and determinations based upon its contract with the Petroleum Exploration. Plaintiff did not begin to take gas under this contract until November of 1927, and it appearing, therefore, that there can [fol. 123] be no determination of the effect of such contract upon the reasonableness of the order of the Railroad Commission without a redetermination of the base value as of a date subsequent to that adopted and used by the court at the request of the parties and a reconsideration of what would be a reasonable rate under changed conditions, if any:

It is ordered that the petition for modification and amendment of the opinion be denied and that the plaintiff be given an extension of ten days from this date in which to

exercise its option of filing written requests for the distribution of the impounded funds.

July 29, 1932.

Chas. H. Moorman, Circuit Judge. C. I. Dawson, District Judge.

IN UNITED STATES DISTRICT COURT

AGREED ORDER AS TO SUBSTITUTION—Entered August 5, 1932

It appearing to the Court that the term of office of the defendant, T. H. Lauhon, as member of the Railroad Commission of Kentucky has expired, and that James Hatcher has been duly elected to said office and has qualified and is now a member of said Railroad Commission; and it further appearing to the Court that the term of office of the defendant, J. W. Cammack, as Attorney General of the Commonwealth of Kentucky has also expired, and that Bailey P. Wooten is now the duly elected and qualified Attorney Gen-[fol. 124] eral of the Commonwealth of Kentucky, it is now ordered, by agreement of parties, that the said James Hatcher be, and he is now hereby, substituted as defendant herein in lieu of the defendant, T. H. Lauhon, and that said Bailey P. Wooten be, and he is hereby, substituted as defendant herein in lieu and instead of the said J. W. Cammack.

Thereupon came attorneys for the defendants and entered the appearance of said James Hatcher as member of the Railroad Commission of Kentucky, and also entered the appearance of Bailey P. Wooten as Attorney General of the Commonwealth of Kentucky.

Done at Lexington, August 5, 1932.

C. I. Dawson, U. S. Dist. Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO FIND FACTS SPECIALLY AND STATE SEPARATELY CONCLUSIONS OF LAW—Filed August 13, 1932

Comes the plaintiff, Central Kentucky Natural Gas Company, and in accordance with the provisions of New Equity

Rule 70½, now moves the Court to make the following special findings of fact, and to state separately its conclusions of law thereon, as follows:

I

Findings of Fact

1. That as of December 31, 1926, and also for the purposes of this case as of February 25, 1927, the date of the franchise contract, and as of October 9, 1929, the date of the [fols. 125 & 126] rate order of the Railroad Commission of Kentucky, complained against herein, and as of the date of the final decree of this Court, the Court find:

* * * * * * *

[fol. 127] f. That the total reproduction cost new, less deterioration, and the total fair value of the rate base property of the plaintiff company, was and is, as of the dates aforesaid, $3,669,400, and allocable to the Lexington district $2,028,069.

2. That the distribution system in the City of Lexington owned by Lexington Utilities Company and leased to plaintiff, was at all times herein used and useful in rendering the plaintiff's gas service in the Lexington district, and should be included as part of the rate base property for the purposes of this case; and that the reproduction cost new, less deterioration, and the fair value of said property; was and is as of the dates aforesaid, $611,227; that as of the dates aforesaid the total reproduction cost new, less deterioration, and the fair value of the combined properties of the plaintiff and Lexington Utilities Company, was and is $4,280,627, and that the fair value of said property allocable to the Lexington district, was and is $2,639,296.

3. That the Court ascertain and determine the net income of plaintiff available for return on the fair value of the rate base properties as may be fixed by it as of the following dates, to-wit: February 25, 1927 (the contract date), December 1, 1927 (the date of the 60¢ temporary rate), and October 9, 1929 (the date of the rate order).

[fol. 128] 4. That prior to and as of the date of the franchise contract, plaintiff had a 10-inch transmission pipe line which was being used for transporting natural gas from the eastern part of the state of Kentucky to the city of Lexington, and that said line was not of sufficient capacity to enable the company to comply with the terms of said franchise; that Section 23 of said franchise ordinance provided that if the company purchasing said franchise should have such 10-inch transmission pipe line, then said company should begin, or cause to have begun within six months after said franchise became effective, the construction of, and have in operation or cause to be operated within nine months thereafter, an additional main line of pipe from adequate sources of supply of natural gas in the state of Kentucky or the state of West Virginia, to the distribution system in the city of Lexington; that Section 22 of said ordinance provides that from and after the time when said company is furnishing gas through two pipe lines, as provided in Section 23, said company agrees that it will furnish gas to the consumers of the City of Lexington for all usual purposes, at all times, at a uniform and adequate pressure at the outlet of each customer's meter. That prior to said franchise contract, the Petroleum Exploration had developed a considerable gas field in Owsley County, Kentucky, and it was contemplated and understood at the time of said franchise contract that plaintiff would be required to have begun the construction of and completed an additional main line from said Owsley County gas field to the city of Lexington, and it was further known and understood by the parties that the plaintiff, in order to secure the construction of said additional pipe line, and in order to procure the delivery of an adequate supply of gas at the Lexington city gate by the Petroleum Exploration Company, would be required to pay said Petroleum Exploration Company 40 cents per m. c. f. for said gas. That in [fol. 129] compliance with the franchise contract requirement, the plaintiff entered into a contract with said Petroleum Exploration Company, bearing date March 24, 1927, (filed in evidence as Company Exhibit No. 22), whereby the plaintiff agreed to purchase from said company a minimum of 750,000,000 cu. ft. of gas per annum de-

livered at the Lexington city gate, and to pay therefore the sum of 40¢ per m. c. f. That Section 4 (E) of said franchise ordinance provided for a temporary rate of 50¢ per m. c. f. until the company was furnishing gas through a pipe line of sufficient capacity (which the plaintiff did not have), or through two pipe lines, as provided in Section 23 of said ordinance; and after said company was furnishing gas through two pipe lines, the company should collect a temporary rate of 60¢ per m. c. f., and further provided that of the amount collected under said temporary rates, there should be impounded the sum of 10¢ per m. c. f. until the final fixation of just and reasonable rates. That the consideration for the increase of said temporary rate from 50¢ to 60¢ was the construction of a main pipe line from Lexington to the Owsley County field and the delivery of gas through said pipe line by the Petroleum Exploration Company, and that plaintiff would thereby be enabled to comply with Section 22 of said ordinance as aforesaid. That a further consideration for the increase in said temporary rate was the additional cost to the plaintiff for the gas purchased under its contract with Petroleum Exploration. That said additional pipe line to the Owsley County gas field was completed, and gas began to be delivered in November, 1927. That said temporary rate of 50 cents was increased to the temporary rate of 60 cents as of December 1, 1927, and from and after said date the plaintiff was required to purchase from said Petroleum Exploration 750,000,000 cu. ft. of gas per annum as a cost of 40 cents per m. c. f., and the cost of said gas from and after De-
[fol. 130] cember 1, 1927, became a part of the operating expenses of plaintiff.

* * * * * * *

[fol. 131] 7. That the parties have requested the Court to ascertain and determine the fair value of the rate base properties as of December 31, 1926, and to adopt and apply the same as the rate base value of plaintiff's properties at all times from and after the date of the Franchise contract, to-wit: February 25, 1927, to and including the date of the final decree of this Court.

8. That the rates promulgated by the plaintiff company on February 26, 1927, were as of said date and at all times

thereafter, and are now, just and reasonable rates for the plaintiff's gas service, and any less rates would be unjust and unreasonable and confiscatory at all times from and after February 25, 1927, (the date of the franchise contract).

9. That the natural gas business in which the plaintiff is engaged, is more hazardous than is the case with other public utilities, and that the plaintiff is entitled to earn a ten per cent (10%) return on the fair value of the rate base properties, and by reason of the extra hazard in said natural gas business any less rate of return than ten per cent (10%) would be unjust and unreasonable.

[fol. 132] II

Conclusions of Law

The plaintiff requests the Court to state the following conclusions of law, to-wit:

1. That by reason of the impounded funds collected under the temporary rates, it is necessary, as a matter of law, to determine the reasonableness of the Commission rate of 45 cents as of the following dates and during the following periods of time, to-wit:

(a) From the date of the franchise contract to the date when the Owsley County gas began to be delivered and the cost of such gas began to be a part of the plaintiff's operating expenses, to-wit, December 1, 1927.

(b) Also from and after December 1, 1927, to and including the date of the Commission rate order, to-wit, October 9, 1929.

2. That in determining the plaintiff's net income available for return at all times from and after the beginning of the delivery of the Owsley County gas and the beginning of the collection of the 60¢ temporary rate, to-wit, December 1, 1927, it is necessary, as a matter of law, to include and allow for, as part of the plaintiff's operating expenses, the cost of said Owsley County gas.

* * * * * * *

[fol. 133] 5. That in determining the plaintiff's net income available for return at all times from and after De-

cember 1, 1927, the cost of the Owsley County gas should be included and allowed as part of plaintiff's operating expenses.

6. That the Commission rate of 45 cents was and is confiscatory at all times from and after the date of the franchise contract, to-wit, February 25, 1927.

7. That under the terms of said franchise contract, the plaintiff has the lawful right to charge and collect reasonable rates and charges for its gas service, and that the schedule of rates promulgated by the company on February 26, 1927, and filed with the Railroad Commission as provided by said contract, were and are just and reasonable rates as of the franchise contract date, and at all times thereafter, to-wit:

60 cents net (63 cents gross) minimum charge including the first 100 cu. feet per month;

6 cents net per 100 cu. ft. for the next 900 cu. ft. per month.

60 cents net (63 cents gross) per 1,000 cu. ft. for the next 4,000 cu. ft. per month;

[fol. 134] 50 cents net (53 cents gross) per 1,000 cu. ft. for all gas in excess of 5,000 cu. ft. per month.

8. That under the terms of said franchise contract, the plaintiff has the lawful right to charge and collect a service charge, or a minimum rate charge, and to charge and collect higher rates for smaller quantities of gas and lower rates for larger quantities of gas, and that the plaintiff, as a matter of law, has the right to fix and promulgate its own rate structure subject only to the limitation that such rate structure shall not be in excess of just and reasonable rates.

* * * * * * *

10. That the natural gas business in which the plaintiff is engaged is more hazardous than is the case with other public utilities, and that the plaintiff is entitled to earn a ten per cent return on the fair value of the rate base properties, and by reason of the extra hazard in said natural gas business any less rate of return than ten per cent would be unjust and unreasonable.

III

The plaintiff moves the Court to enter its order upon this motion prior to the entry of any decree herein.

D. L. Hazelrigg, Chester J. Gerkin, Allen, Botts & Duncan, Attorneys for Plaintiff.

[fol. 135] In United States District Court

Order of Submission—Entered August 13, 1932

The plaintiff herein having filed in the Clerk's Office of this Court at Lexington on August 13, 1932, its motion to make special findings of fact and to state separately its conclusions of law thereon, it is now ordered that said motion be noted of record and the same is submitted for the consideration and order of Court thereon.

Done at Lexington, August 13, 1932.

Chas. H. Moorman, Circuit Judge. Smith Hickenlooper, Circuit Judge. C. I. Dawson, U. S. Dist. Judge.

In United States District Court

Letter to Clerk—Filed Sept. 22, 1932

Mr. S. W. Stacey, Clerk U. S. District Court, Covington, Ky.

My Dear Mr. Stacey: Enclosed you will find final decree in the above case signed by Judge Moorman and myself, a majority of the three judge court sitting. Judge Dawson who was the third judge does not agree with the form and substance of the decree and was therefore unwilling to sign it.

[fol. 136] Should there be any inquiry you wish to make in this connection you can reach me by telephone at the Government Building, Cincinnati, Main 6720.

Yours very truly, Smith Hickenlooper.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO FIND SPECIALLY THE FACTS AND STATE CONCLUSIONS OF LAW—Entered September 22, 1932

The Court having considered the plaintiff's motion for special findings of fact and conclusions of law thereon, and the Court having in its opinion sufficiently found the facts and stated its conclusions thereon as set out in its decree, the said motion of plaintiff is overruled to which ruling the plaintiff excepts as to each of said motions.

Done at Lexington, September 22, 1932.

Chas. H. Moorman, U. S. Circuit Judge. Smith Hickenlooper, Circuit Judge. C. I. Dawson, U. S. Dist. Judge.

[fol. 137] IN UNITED STATES DISTRICT COURT

DECREE—Entered September 22, 1932

This cause came on to be heard, and upon consideration thereof after argument by counsel, orally and by brief, the court filed a written opinion setting forth its findings of fact and conclusions of law, pursuant to which it finds, orders and decrees as follows:

First. That as of December 31, 1926, the fair value of that part of the complainant's property allocable to Lexington is $1,586,880.

Second. That the fair value of the distributing system in the City of Lexington known as the Lexington Utilities Company property is treated, at complainant's instance, as a part of the rate base value of complainant's property allocable to Lexington, which fair value is found to be $611,227 as of December 31, 1926.

Third. That the total value of the complainant's property allocable to Lexington for the purpose of fixing the rate base as of December 31, 1926, the date the court was asked to determine such value, is the total of the two aforesaid values, equaling $2,198,107.

Fourth. That a seven per cent return on the total fair value of the rate base properties as heretofore determined is a fair and reasonable rate of return.

Fifth. That the forty-five cent rate for gas fixed by the Railroad Commission by its order entered on October 9, 1929, will not yield a seven per cent rate of return and is found to be inadequate and invalid; and plaintiff is entitled to an injunction restraining its enforcement, but only if the plaintiff will do equity by consenting to or request-
[fol. 138] ing the return to its customers in Lexington of all sums impounded under the orders of this court and other tribunals in excess of a reasonable charge as more fully indicated herein below.

Sixth. That a rate of fifty cents per m. c. f. for gas may reasonably be expected to produce net income available for dividends, after the deduction of all properly allowable amounts for amortization, depletion, extraordinary maintenance and current expenses, in the sum of $144,837, which sum represents a return of substantially seven per cent on the complainant's capital investment, which return is found to be fair and reasonable.

Seventh. That by an opinion filed herein on July 11, 1932, which opinion is made a part of this decree, it was provided, among other things, as follows:

"An order of injunction, enjoining the enforcement of the Commission's order, will accordingly be issued, provided the plaintiff file in this court in ten days a written request that this court order all funds in excess of the 50 cent rate impounded under its orders distributed to and among the consumers of the plaintiff in Lexington entitled thereto, and provided further that it file in this court within ten days satisfactory evidence that it has made written request of the Railroad Commission of Kentucky and of the Fayette Circuit Court of Kentucky that those tribunals make like orders of distribution of all funds in excess of the fifty cent rate which are impounded and held under their orders."

That before the ten days elapsed, the complainant filed its petition for a modification and/or amendment of the opinion; that on July 29, 1932, an order was entered by

the court overruling said petition, and that said order gave the complainant a further extension of ten days from said date wherein to exercise its option as aforesaid, and that on August 6, 1932, the complainant filed with the court a written statement declining to accept the condition set forth in the opinion.

[fol. 139] Eighth. That complainant, having declined to request or accept the condition precedent as fixed by the court to the granting of an injunction in its favor against the forty-five cent rate, namely—that all funds in excess of a fifty cent rate, impounded under the orders of this court and other tribunals, be distributed among the consumers in Lexington entitled thereto—it is now further ordered and decreed as follows:

(a) That the prayer for a permanent injunction herein be and the same is denied with costs to be paid by the complainant to the several defendants to be taxed.

(b) That the funds impounded under the temporary rates since the filing of this action should be and they are now hereby directed to be distributed to the consumers of the complainant on the basis of fifty cents per m. c. f. for gas as a reasonable rate.

(c) That the complainant, Central Kentucky Natural Gas Company, be and it is hereby ordered and directed to prepare, make up and file, in triplicate, in the office of the clerk of this court at Lexington, Kentucky, a full and detailed statement of the amounts between the forty-five cent rate and fifty cent rate per thousand cubic feet paid by all customers of the complainant at Lexington into the funds impounded under the franchise contract for and during the time when the rate collected under such franchise contract was fifty cents per thousand cubic feet; and that complainant also file a detailed statement of the amounts between the fifty and sixty cent rate per thousand cubic feet paid by all such customers into the impounded funds under said franchise contract for and during the time when the rate collected under such franchise contract was sixty cents per thousand cubic feet.

[fols. 140 & 141] Ninth. This cause is reserved on the docket and control thereof retained by the court for such

further proceedings and orders as may be had on motion of the parties or by the court on its own motion.

Chas. H. Moorman, Smith Hickenlooper, Circuit Judges.

IN UNITED STATES DISTRICT COURT

ORDER FILING PETITION FOR REHEARING—Entered October 22, 1932

The plaintiff, Central Kentucky Natural Gas Company, having filed in the office of the Clerk of this court at Lexington on October 22, 1932, its petition for rehearing, it is now ordered that said petition for rehearing be filed and noted of record.

Dated October 22, 1932.

Chas. H. Moorman, Smith Hickenlooper, C. I. Dawson, Judges.

[fol. 142] IN UNITED STATES DISTRICT COURT

ORDER DENYING PETITION FOR REHEARING—Entered November 22, 1932

It appearing to the court that the petition for rehearing filed herein by the plaintiff presents no questions of fact or law not considered by the court on the original hearing nor reconsidered and denied on the plaintiff's petition for modification and amendment of the opinion, and a majority of the court being of opinion that the true facts of the case and the correct conclusions of law applicable thereto are correctly found and stated in the opinion heretofore filed, and further, that the decree rendered thereon was within the discretionary power of the court and was fully justified in the circumstances disclosed by the record;

It is ordered that the petition for rehearing be denied.

Chas. H. Moorman, Smith Hickenlooper.

IN UNITED STATES DISTRICT COURT

ORDER FILING APPEAL PAPERS—Entered December 20, 1932

The plaintiff, Central Kentucky Natural Gas Company, having this day lodged with the Clerk of the Court its Peti-

tion for Appeal, Assignment of Errors and Statement for Jurisdiction on Appeal, same are now ordered filed.

The appeal bond is fixed in the amount of $1,000.00. Whereupon, plaintiff, Central Kentucky Natural Gas Com-
[fol. 143] pany, tendered a bond in said amount with the Fidelity & Deposit Company of Maryland, surety, and same is hereby approved and ordered filed.

Dated December 20, 1932.

Chas. H. Moorman, Smith Hickenlooper, C. I. Dawson, Judges.

In United States District Court

Petition for Appeal—Filed December 20, 1932

To the Honorable Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky; Smith Hickenlooper and Charles H. Moorman, Judges of the United States Circuit Court of Appeals for the Sixth Circuit, sitting as the statutory three-judge court in the above-styled cause:

The Central Kentucky Natural Gas Company feeling aggrieved by the decree entered in the above entitled cause on the 22nd day of September, 1932, hereby appeals from said decree to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law, and that transcript of the record, proceedings, evidence and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, District of Columbia, under the rules of said Court in such case made and provided.

[fol. 144] Your petitioner further prays that the proper order relating to the security required of it to be made, and that same operate as a supersedeas herein, and that upon giving such security all further proceedings in this Court be suspended and stayed until the decision of said appeal by the Supreme Court.

Dated December 20, 1932.

Central Kentucky Natural Gas Co., by D. L. Hazelrigg, Chester J. Gerkin, Henry T. Duncan, Attorneys.

In United States District Court

Assignment of Errors—Filed December 20, 1932

Now comes Central Kentucky Natural Gas Company, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for from the decree of this Court entered on the 22nd day of September, 1932.

I. The Court committed error in failing and refusing to find the facts of this cause specially and to state separately its conclusions of law and to enter a separate order thereon; and in limiting its findings of fact and conclusions of law to those contained in the opinion handed down July 11, 1932, and to the decree entered herein on September 22, 1932, and in holding that said decree and opinion constituted proper [fol. 145] or sufficient findings of fact or conclusions of law.

II. The Court committed error in overruling the motion of plaintiff to find specially certain facts as therein set out, and to state its conclusions of law thereon.

III. The Court committed error in determining the value of plaintiff's rate base property allocable to the Lexington district only as of December 31, 1926, which was prior to the franchise contract date, to-wit, February 25, 1927, and prior to the period in controversy; and in failing and refusing to find such value as of the date of the franchise contract, and as of the date of the Commission Rate Order, to-wit, October 9, 1929, and as of the date of the final decree of this Court.

IV. The Court committed error in failing and refusing to adopt and apply the value of the rate base property determined by it as of December 31, 1926, as the value of said property on the effective date of the franchise contract and for the purposes of this case at all times thereafter to the final decree of this Court.

V. The Court committed error in finding and stating in its opinion that it was requested to determine the rate base as of December 31, 1926; and in further finding and stating in its said opinion that the Court was asked to fix the rate base and determine the income as of December 31, 1926.

VI. The Court committed error in failing and refusing to ascertain and determine the net income of plaintiff available for return as for a normal year on the rate base as fixed by it as of the following dates, to-wit: February 25, 1927 (the contract date); December 1, 1927 (the date of the beginning of the 60-cent temporary rate); and October 9, 1929 (the date of the rate order).

[fol. 146] VII. The Court committed error in failing and refusing to find the following facts, to-wit: That prior to and as of the date of the franchise contract, plaintiff had a 10-inch transmission pipe line which was being used for transporting natural gas from the eastern part of the State of Kentucky to the city of Lexington, and that said line was not of sufficient capacity to enable the Company to comply with the terms of said franchise; that Section 23 of said franchise ordinance provided that if the Company purchasing said franchise should have such 10-inch transmission pipe line, then said company should begin, or cause to have begun within six months after said franchise became effective, the construction of, and have in operation or cause to be operated within nine months thereafter, an additional main line of pipe from adequate sources of supply of natural gas in the State of Kentucky or the State of West Virginia, to the distribution system in the City of Lexington; that said ordinance (Sections 22 and 23) requires plaintiff to furnish gas to the consumers of the City of Lexington for all usual purposes, at all times, at a uniform and adequate pressure at the outlet of each customer's meter.

That prior to said franchise contract, the Petroleum Exploration had developed a considerable gas field in Owsley County, Kentucky, and it was contemplated and understood at the time of said franchise contract that plaintiff would be required to have begun the construction of and completed an additional main line from said Owsley County gas field to the City of Lexington, and it was further known and understood by the parties that the plaintiff, in order to secure the construction of said additional pipe line, and in order to procure the delivery of an adequate supply of gas at the Lexington city gate by the Petroleum Exploration company, would be required to pay said company 40 cents per M. cubic feet for said gas. That in compliance with the [fol. 147] franchise contract requirement, the plaintiff

entered into a contract with said Petroleum Exploration, bearing date of March 24, 1927 (introduced in evidence as Company Exhibit No. 22), whereby the plaintiff agreed to purchase from said company a minimum of 750,000,000 cu. ft. of gas per annum delivered at the Lexington city gate, and to pay 40 cents per M. cubic feet therefor.

That Section 4 (E) of said franchise ordinance provided for a temporary rate of 50 cents per M. cubic feet until the company was furnishing gas through a pipe line of sufficient capacity (which the plaintiff did not have), or through two pipe lines, as provided in Section 23 of said ordinance; and that after the company began furnishing gas through two pipe lines, it should collect a temporary rate of 60 cents per M. cubic feet, and further provided that of the amount collected under said temporary rates, there should be impounded the sum of 10 cents per M. cubic feet until the final fixation of just and reasonable rates. That the consideration for the increase of said temporary rate from 50 cents to 60 cents was the construction of a main pipe line from Lexington to the Owsley field and the delivery of gas through said transmission line by the Petroleum Exploration Company to plaintiff, thereby enabling it to comply with Section 22 of said franchise contract. That a further consideration for the increase in said temporary rate was the additional cost of the plaintiff for the gas purchased under its contract with Petroleum Exploration. That said additional pipe line to the Owsley County gas field was completed, and deliveries of gas began in November, 1927. That said temporary rate of 50 cents was increased to 60 cents as of December 1, 1927, and from and after said date plaintiff was required to purchase from said Petroleum Exploration 750,000,000 cu. ft. of gas per annum at a price of 40 cents per M. cubic feet which cost became a part of its operating expenses.

[fol. 148] VIII. The Court committed error in failing and refusing to find that the rates promulgated by the company on February 26, 1927, were as of said date, and at all times thereafter to the final decree of this court, just and reasonable rates for plaintiff's gas service; and that any lower rates would be unjust and unreasonable and confiscatory at all times from and after February 25, 1927 (the date of the franchise contract).

IX. The Court committed error in limiting its finding that the 45 cent rate promulgated by the Commission was inadequate and confiscatory only as applied to December 31, 1926, which date was prior to the period in controversy, and in failing and refusing to find that said Commission rate was confiscatory as of the date of the franchise contract and at all times thereafter to the final decree of this Court.

X. The Court committed error in failing and refusing to state the following conclusion of law, to-wit, that in order to determine the rights of the parties to the funds impounded under the franchise contract it was necessary to determine the reasonableness of the Commission rate of 45 cents as of the contract date, and at all times thereafter to the final decree of this Court.

XI. The Court committed error in refusing to hold as a matter of law that in determining the plaintiff's net income available for return at all times from and after the beginning of the delivery of gas by Petroleum Exploration, and the beginning of the collection of the 60 cent temporary rates, to-wit, December 1, 1927, it was necessary to include and allow for as a part of plaintiff's annual operating expenses the cost of the minimum annual amount agreed to be purchased under the Petroleum Exploration contract.

XII. The Court committed error in finding and holding that a rate of 50 cents per M. cubic feet for gas may reason-
[fol. 149] ably be expected to produce net income available for dividends after the deduction of all properly allowable amounts for amortization, depletion, extraordinary maintenance, and operating expenses in the sum of $144,837.00; and in holding that said rate would produce a return of substantially 7% on the plaintiff's capital investment, and that a 7% rate of return is fair and reasonable for plaintiff.

XIII. The Court committed error in failing and refusing to find that the natural gas business in which plaintiff is engaged is more hazardous than is the case with other public utilities, and that the plaintiff is entitled to earn a ten per cent (10%) return on the fair value of the rate base properties, and by reason of the extra hazard of said natural gas business any less rate of return would be unjust and unreasonable.

XIV. The Court committed error in ordering that the funds impounded under the temporary rates since the filing of this action be distributed to the consumers of the plaintiff on the basis of 50 cents per M. cubic feet for gas as a reasonable rate, and without first determining just and reasonable rates and charges for plaintiff's gas service during said period.

XV. The Court committed error in failing and refusing to find as a matter of law that under the terms of said franchise contract plaintiff has the lawful right to charge and collect a service charge, or a minimum rate charge, and to charge and collect higher rates for smaller quantities of gas and lower rates for larger quantities of gas, and that the plaintiff has the right to fix and promulgate its own rate structure, subject only to the limitation that such rate structure should not be in excess of just and reasonable rates and charges.

XVI. The Court committed error in failing and refusing to find that a flat rate per M. cubic feet for natural gas is [fol. 150] discriminatory and confiscatory, in that such form of rate compels the plaintiff to furnish gas service to a large percentage of its customers at less than cost.

XVII. The Court committed error in requiring as a condition to the granting of a permanent injunction against the Commission rate of 45 cents, that plaintiff file in this court a written request that the Court order all funds in excess of the 50 cent rate impounded under its orders distributed to and among the customers of plaintiff in Lexington, and also to file in this court satisfactory evidence that it had made written request of the Railroad Commission of Kentucky, and of the Fayette Circuit Court of Kentucky, that those tribunals make like orders of distribution of all funds in excess of the 50 cent rate impounded and held under their orders; and in refusing to grant a permanent injunction against said Commission rate by reason of the plaintiff having declined to request or accept said condition precedent to the granting of such injunction, and in refusing to grant unconditionally a permanent injunction against said Commission Order, as prayed for by plaintiff in this action.

XVIII. The Court committed error in ordering that the costs incurred in this action be paid by plaintiff in contra-

vention of the express agreement contained in the franchise contract, and as set forth in Section 35 thereof, that all costs in all court proceedings should be paid for equally by the parties.

XIX. The Court committed error in overruling plaintiff's petition for rehearing.

Dated December 20, 1932.

D. L. Hazelrigg, Chester J. Gerkin, Henry T. Duncan, Attorneys for Plaintiff.

[fols. 151-153] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Entered December 20, 1932

The plaintiff, Central Kentucky Natural Gas Company, having this day filed its petition for appeal from the decree entered in the above entitled cause to the Supreme Court of the United States, together with an Assignment of Errors, and praying for an order to be made herein fixing the amount of security which plaintiff should give and furnish upon said appeal, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said appeal to said The Supreme Court of the United States;

Now, therefore, it is ordered that upon the plaintiff filing with the Clerk of this Court a good and sufficient bond in the sum of $1,000.00 to be approved by the Court, to the effect that if the plaintiff, Central Kentucky Natural Gas Company, shall prosecute the said appeal to effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and effect; that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said appeal to the Supreme Court of the United States, and it is further ordered that said bond shall operate as a supersedeas bond and for costs and damages on appeal.

Dated December 20, 1932.

Chas. H. Moorman, Smith Hickenlooper, C. I. Dawson, Judges.

[fols. 154-160] Citation, in usual form, showing service on B. P. Wooten et al., omitted in printing.

[fols. 161 & 162] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

Condensed Statement of Pleadings Before Railroad Commission of Kentucky and Evidence Essential to Decision of Questions Presented on Appeal—Filed March 9, 1933

Lodged Jan. 16, 1933. S. W. Stacey, Clerk

The following is a condensed statement of the pleadings, proceedings and evidence taken before the Railroad Commission of Kentucky, upon which this case was submitted.

[File endorsement omitted.]

* * * * * * *

[fol. 163] ABSTRACT OF PLEADINGS AND PROCEEDINGS BEFORE RAILROAD COMMISSION

The certified record of the pleadings and proceedings before the Railroad Commission shows:

1. That on March 25, 1927, the City of Lexington and S. B. Featherstone filed before the Railroad Commission of Kentucky, a complaint against the Central Kentucky Natural Gas Company, complaining that the schedule of rates and charges promulgated by the Company on February 26th, 1927, pursuant to the provisions of the franchise-contract (See Exhibit "A" filed with Bill of Com-

plaint), were exorbitant; which said rates and charges were as follows:

(1) A minimum monthly charge of [illegible]-three ($.63) cents subject to a discount of three cents ($.03) if paid within the discount period, such minimum charge to include without further charge the first one hundred (100) cubic feet of gas used.

(2) For the next nine hundred (900) cubic feet, the sum of six cents ($.06) per one-hundred (100) cubic feet without further discount.

(3) For the next four thousand (4,000) cubic feet sixty-three cents ($.63) per one thousand (1,000) cubic feet, subject to a discount of three cents ($.03) per one thousand (1,000) cubic feet, if paid within the discount period.

(4) For all over five thousand (5,000) cubic feet, the sum of fifty-three cents ($.53) per one thousand (1,000) cubic feet, subject to a discount of three cents ($.03) per one thousand (1,000) cubic feet if paid within the discount period.

2. That on March 28, 1927, the Central Kentucky Natural Gas Company filed its answer consisting of a general denial.

3. That on April 13, 1927, pursuant to the joint motion of the complainants and defendant, John H. Carter was appointed as custodian of the funds agreed to be impounded under said franchise-contract.

4. That the trial of said case was continued by the orders [fol. 164] of said Railroad Commission from time to time until March 15, 1928, at which time the taking of testimony began.

* * * * * * *

7. That hearings were held from time to time before said Railroad Commission, and on October 9th, 1929, the Commission entered its order fixing a flat rate of forty-five cents ($.45) for the Gas Company's gas service.

[fol. 165] Condensed Statement of Evidence under Equity Rule 75(b)

Hearing March 14, 1928

For the Company

JOHN T. KIMBALL testified:

Witness was a member of the engineering firm of Ford, Bacon & Davis, Inc., of New York City and qualified as an experienced valuation engineer and accountant.

That he had made a valuation of the properties of Central Kentucky Natural Gas Company and also of the Lexington Utilities Company (being the distribution plant situated in the City of Lexington and leased to the Central Company), on the basis of reproduction cost new less deterioration as of December 31, 1926, and also as of December 31, 1927 (by adding to the value as of December 31, 1926, the net additions to plant during the year 1927), and that the difference in the value of said properties as depreciated by him as of said two dates amounted to $141,210.00.

Witness presented and filed the following Exhibits, to-wit:

Company Exhibit No. 4, dated January 4, 1928, and entitled "Net revenue available for return on property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., based on operating reports of the Central Kentucky Natural Gas Company, Inc., for the years 1922 to 1926, inclusive."

Company Exhibit No. 6, dated February 19, 1928, and en-[fol. 166] titled "Estimate of net revenue available for return on property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., with proposed retail rate of 60-cent minimum charge, including first 100 cu. ft. per month; 6 cents per 100 cu. ft. for next 4,900 cu. ft. per month; 50 cents per M C. F. for all over 5,000 cu. ft. per month."

Company Exhibit No. 8, dated April 17, 1928, and entitled "Net revenue available for return on property of Central Kentucky Natural Gas Company, Inc., and Lexington Utili-

ties Company, Inc., based on operating reports of the Central Kentucky Natural Gas Company, Inc., for the year 1927."

* * * * * * *

A copy of each of said Exhibits is filed herewith as a part hereof excluding from Exhibit No. 4, as not material to any assigned error on this appeal, pages 19 to 24, both inclusive, and pages 26 to 45, both inclusive.

The material portion of the testimony of said witness concerning the aforesaid Company Exhibits No. 4, No. 6 and No. 8 is reproduced in the form of questions and answers in the exact words of said witness as follows:

[fol. 166½] Taxes

The pages immediately following show in detail the Franchise and Tangible Property Taxes by State and Counties, the Federal income tax and miscellaneous taxes for the years 1922 to 1926, inclusive.

In these statements the taxes shown on the annual reports of the Central Kentucky Nat. Gas Company Inc. have been adjusted, based upon the Tax Commissioner's valuation, to properly apportion to each year's operations, the taxes applicable to that year. Details of these adjustments are shown, as are also the details of allocation to the Lexington District. The franchise, tangible property and special assessment taxes paid in the State of Kentucky and the various cities and counties are allocated to the Lexington District either directly, such as the tax paid to the City of Lexington, or on a gas sales basis, giving effect to the location of the county wherein the taxes were assessed. The Federal income tax was allocated to the Lexington District on the ratio of gas sales in that district to the total gas sales of the Company.

[fol. 166-a] [File endorsement omitted]

COMPANY EXHIBIT No. 4

[fol. 166-a-1] Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., Based on Operating Reports of the Central Kentucky Natural Gas Company, Inc., for the Years 1922 to 1926, Inclusive

January 4, 1928

Ford, Bacon & Davis, Incorporated, Engineers, New York, Philadelphia, Chicago, San Francisco, New Orleans

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[fol. 166-a-3] Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., Based on Operating Reports of the Central Kentucky Natural Gas Company, Inc., for the Years 1922 to 1926, Inclusive

January 4, 1928

The following statements show the revenue of the Central Kentucky Natural Gas Company, Inc. available for return on the combined property of the Central Kentucky Natural Gas Company, Inc., and the Lexington Utilities Company, Inc. for the years 1922 to 1926, inclusive, together with all supporting figures. The Central Kentucky Natural Gas Company, Inc., leases the property of the Lexington Utilities Company, Inc.—which consists of the distribution system inside the corporate limits of the City of Lexington—and operates this distribution system as a part of the Central Kentucky Natural Gas Company's system. In the following statements, the rental paid to the Lexington Company by the Central Company (12.5 per cent of the gross revenue in Lexington less $1,250 per year) has been excluded from the expenses of the latter.

The term, "Lexington District", as used in the various statements, includes the suburbs of the City as well as the City proper.

In 1926 the Central Kentucky Natural Gas Co., Inc. retailed gas at 50 cents per M. c. f., 10 cents of which was impounded pending settlement of rate controversy. The [fol. 166-a-4] Company therefore prepared two annual reports, one based on a 40 cent rate and the other on a 50 cent rate. Gas purchased contracts, in a number of instances, fix the price of gas sold to the Central Kentucky

Natural Gas Co. Inc. as a function of the retail selling price of gas sold by that Company, and therefore a change in the retail selling price of gas affects the expenses as well as the revenue. The income and expenses for 1926 are shown, in the following statements, based on both the 40 cent and 50 cent rates.

The pages following show:

(a) Net revenue available for return.

(b) Summary of Revenue and Expenses.

(c) Details of Gross Revenue.

(d) Details of Expenses and Taxes.

(e) Estimated Annual Allowance necessary for amortization, depletion, extraordinary maintenance and contingencies.

Unless stated otherwise, the gas sales (M. c. f.) and the revenue and expenses tabulated on the following statements were taken from the books and/or reports of the Central Kentucky Natural Gas Company, Inc.

[fol. 166-a-5]

Net Revenue of the Central Kentucky Natural Gas Co., Inc., Available for Return on Property of Central Kentucky Natural Gas Co., Inc., and Lexington Utilities Co., Inc., for the Year 1926, with Retail Gas Sales at 40 cents per M. C. F.

	Entire system	Lexington district
Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$322,911	$196,232
Deduct: Estimated Annual Allowance necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	202,268	121,530
Net Revenue Available for Return	$120,643	$74,702

[fol. 166-a-6]

Net Revenue of the Central Kentucky Natural Gas Co., Inc., Available for Return on Property of Central Kentucky Natural Gas Co., Inc., and Lexington Utilities Co., Inc., for the Year 1926, with Retail Gas Sales at 50 cents per M. C. F.

	Entire system	Lexington district
Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$428,218	$278,254
Deduct: Estimated Annual Allowance necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	202,268	121,530
Net Revenue Available for Return	$225,950	$156,724

[fol. 166-a-7]

Net Revenue of the Central Kentucky Natural Gas Co., Inc., Available for Return on Property of the Central Kentucky Natural Gas Co., Inc., and the Lexington Utilities Co., Inc., based on the average of the Years 1922 to 1926, inclusive, with the Retail Gas Sales at 40 Cents per M. C. F.

	Entire system	Lexington district
Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends:		
1922	$246,424	$143,120
1923	285,153	189,961
1924	279,164	180,632
1925	250,593	169,769
1926	322,911	196,232
Total	$1,384,245	$879,714
Average	$276,849	$175,943
Deduct: Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	$202,268	$121,530
Net Revenue Available for Return	$74,581	$54,413

(Here follows revenue and expense statement, side folios 166-a-8-166-a-10)

[fols. 166-a-8-166-a-10] Revenue and Expense Statement for Entire System and Proportion Allocated to Lexington District Years Ended December 31, 1922, to 1926, Inclusive

	Entire system						Lexington District					
					1926						1926	
	1922	1923	1924	1925	At 40c rate	At 50c rate	1922	1923	1924	1925	At 40c rate	At 50c rate
Gross Revenue from Operation												
Gas Sales:												
Lexington—urban and suburban	$428,100	$496,782	$530,668	$510,699	$522,349	$652,509	$428,100	$496,782	$530,668	$510,699	$522,349	$652,509
Winchester and Mt. Sterling	157,231	179,105	190,142	175,802	188,056	233,119	.....	.....	.....	.....	.....	.....
Wholesales	156,721	147,456	164,049	161,531	177,146	192,395	.....	.....	.....	.....	.....	.....
Total Gas Sales	$742,052	$823,343	$884,859	$848,032	$887,551	$1,078,023	$428,100	$496,782	$530,668	$510,699	$522,349	$652,509
Gasoline	.....	5,376	8,794	7,724	11,236	11,236	.....	3,236	4,962	4,358	6,339	6,339
Shop	7,612	5,911	6,356	2,378	6,091	6,091	5,588	4,339	4,666	1,746	4,471	4,471
Interest	43	42	42	143	(A)1,481	1,481	24	24	24	81	836	836
Miscellaneous	420	773	1,039	658	665	665	237	436	586	371	375	375
Total Gross Revenue	$750,127	$835,805	$901,099	$858,935	$907,024	$1,097,496	$433,949	$504,817	$540,906	$517,255	$534,370	$664,530
Operating Expenses												
Field and Main Line Expense	$34,159	$46,249	$52,265	$50,276	$48,811	$48,811	$19,273	$26,094	$29,488	$28,366	$27,539	$27,539
City Plant Expense	47,476	48,871	55,878	57,398	61,900	61,900	32,752	33,433	40,115	35,415	42,621	42,621
General Expense	29,820	26,036	35,752	43,845	32,401	32,401	17,335	15,188	20,816	25,546	18,954	18,954
Gas Purchased	343,924	377,408	426,657	401,069	388,619	455,524	194,042	212,934	240,720	226,283	219,259	257,007
Total Operating Expenses	$455,379	$498,564	$570,552	$552,588	$531,731	$598,636	$263,402	$287,649	$331,139	$315,610	$308,373	$346,121
Net Revenue before Taxes	$294,748	$337,241	$330,538	$306,347	$375,293	$498,860	$170,547	$217,168	$209,767	$201,645	$225,997	$318,409
Taxes	48,324	52,088	51,374	55,754	52,382	70,642	27,427	27,207	29,135	31,876	29,765	40,155
Net Operating Revenue, Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$246,424	$285,153	$279,164	$250,593	$322,911	$428,218	$143,120	$189,961	$180,632	$169,769	$196,232	$278,254

NOTE—(A) Company's Books show $5,647; Ford, Bacon & Davis, Inc. deduct the interest received from Hillsdale Gas Co., i.e. $5,504, which has been considered herein as non-operating revenue.

[fols. 166-a-11-166-a-15] Central Kentucky Natural Gas Company, Inc.

Calculation of Percentages Used in the Allocation of Revenue, Expenses, and Taxes to Lexington District, Based on Company's Gas Sales

	Year ended December 31						
					1923 to 1926, incl.		
Retail Sales:	1923 (M. c. f.)	1924 (M. c. f.)	1925 (M. c. f.)	1926 (M. c. f.)	Total (M. c. f.)	Average (M. c. f.)	Percentages used in allocation
Lexington Urban	1,178,656	1,236,613	1,166,131	1,218,312	4,798,712	1,199,678	.....
Lexington Suburban	62,426	89,500	108,887	85,590	346,403	86,601	.....
Total Lexington District	1,241,082	1,325,113	1,275,018	1,303,902	5,145,115	1,286,279	56.42%
Winchester	285,787	304,017	277,685	295,304	1,162,793	290,698	12.75
Mt. Sterling	164,003	173,056	163,849	177,926	678,834	169,709	7.44
Total Retail Sales	1,690,872	1,802,186	1,716,552	1,777,132	6,986,742	1,746,686	
Wholesale Sales:							
Frankfort Kentucky Natural Gas Co	321,829	339,933	317,067	331,847	1,310,676	327,669	.....
Kentucky Utilities Co	174,537	210,642	187,373	189,145	761,697	190,424	.....
Blue Grass Natural Gas Company	15,690	15,793	14,750	14,185	60,418	15,104	.....
Total Wholesale Sales	512,056	566,368	519,190	535,177	2,132,791	533,197	23.39
Total Sales	2,202,928	2,368,554	2,235,742	2,312,309	9,119,533	2,279,883	100.00%

(Here follows statement of gas production and purchases, years ended December 31, 1922 to 1926, inclusive, side folio 166-a-16.)

[fol. 166-a-16]

Central Kentucky Natural Gas Company, Inc.

Gas Production and Purchases, Years Ended December 31, 1922 to 1926, Inclusive

	1922			1923			1924			1925			1926				
														Based on 40c sales rate (A)		Based on 50c sales rate (A)	
	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.	Amount	Per M. c. f.
Gas Purchases:																	
United Fuel Gas Co	1,501,323	$260,247	17.3c	1,535,583	$307,116	20.0c	1,198,486	$239,697	20.0c	940,507	$188,101	20.0c	955,126	$191,025	20.0c	$238,781	25.0c
Ky. Cities Gas Co	339,642	47,550	14.0	72,358	10,130	14.0	331,811	58,067	17.5	226,991	39,723	17.5	147,369	25,790	17.5	29,474	20.0
Bed Rock Petroleum Co	324,063	34,373	10.6	247,735	29,728	12.0	205,973	24,717	12.0	165,824	19,899	12.0	138,177	16,581	12.0	20,727	15.0
Carrol Oil and Gas Co	659,543	60,469	9.2	537,988	53,799	10.0	310,613	31,061	10.0	251,953	25,195	10.0	259,454	25,946	10.0	25,946	10.0
Petroleum Export Co., Inc	33,428	4,011	12.0	92,407	11,089	12.0	164,782	24,717	15.0	140,746	21,112	15.0	112,965	16,945	15.0	19,769	17.5
Hilldale Gas Co	.....	.....	.....	.....	.....	.....	31,864	6,373	20.0	751,498	150,300	20.0	560,515	112,103	20.0	130,787	23⅓
Boston and S. W. Oil and Gas Co	.....	.....	.....	38,317	3,832	10.0	120,129	12,013	10.0	104,181	10,418	10.0	94,243	9,424	10.0	9,424	10.0
Pa.-John Oil Co	.....	.....	.....	41,369	3,476	8.4	135,000	13,500	10.0	77,762	7,776	10.0	75,524	7,552	10.0	7,552	10.0
Martin Oil and Gas Co	.....	.....	.....	.....	.....	.....	48,934	4,894	10.0	33,171	3,317	10.0	35,633	3,563	10.0	3,563	10.0
Portsonmouth O. K. Gas Co	.....	.....	.....	.....	.....	.....	25,073	2,507	10.0	22,209	2,221	10.0	23,946	2,395	10.0	2,395	10.0
East Ky. Oil Co	.....	.....	.....	.....	.....	.....	55,023	5,502	10.0	36,076	3,608	10.0	31,548	3,155	10.0	3,155	10.0
Eastern Ky. Oil Co	.....	.....	.....	.....	.....	.....	.....	.....	.....	1,291	129	10.0	21,861	2,186	10.0	2,186	10.0
Fearless Oil & Gas Co	.....	.....	.....	4,907	491	10.0	14,304	1,431	10.0	13,714	1,372	10.0	17,868	1,787	10.0	1,787	10.0
Alamander Kelley	.....	.....	.....	.....	.....	.....	57,761	5,776	10.0	59,373	5,937	10.0	59,983	5,998	10.0	5,998	10.0
George and Touma	.....	.....	.....	.....	.....	.....	444	44	10.0	9,012	901	10.0	17,298	1,730	10.0	1,730	10.0
Lewis Vincent	.....	.....	.....	.....	.....	.....	.....	.....	.....	5,475	1,095	20.0	8,860	1,772	20.0	1,772	20.0
J. T. Hare & Son	.....	.....	.....	.....	.....	.....	.....	.....	.....	22,347	2,235	10.0	16,248	1,625	10.0	1,624	10.0
McNab & Cheuvront	.....	.....	.....	.....	.....	.....	.....	.....	.....	14,749	1,475	10.0	31,243	3,124	10.0	3,124	10.0
Total Gas Purchases	2,857,999	$406,650	14.2c	2,570,664	$419,661	16.3c	2,700,197	$430,299	15.9c	2,876,879	$484,814	16.8c	2,607,861	$432,701	16.6c	$509,794	19.5c
Less Amount Stored in Menifee Field (D)	775,049	72,020	9.3	672,055	67,534	10.0	499,289	49,929	10.0	837,688	112,209	13.4	788,600	102,245	13.0	112,433	14.3
Net Available Purchased Gas	2,082,950	$334,630	.....	1,898,609	$352,127	.....	2,200,908	$380,370	.....	2,039,191	$372,605	.....	1,819,261	$330,456	.....	$397,361	.....
Production:																	
Withdrawn from Menifee Field (B)	92,781	(C)	(C)	291,625	(E)	(E)	390,594	$38,592(F)	.....	232,642	$27,731	11.9	473,968	$56,497	11.9	$56,497	11.9
Produced from Red Bush Field	.....	.....	.....	212,247	.....	.....	166,135	.....	.....	103,762	.....	.....	220,148	.....	.....	.....	.....
Total Production	92,781	(C)	(C)	503,872	.....	.....	556,729	$38,592	.....	336,404	$27,731	.....	694,116	$56,497	.....	$56,497	.....
Total Gas Available for Sale and Use as per Company's Books	2,175,731	$334,630	15.4c	2,402,481	$352,127	14.7c	2,757,637	$418,962	15.2c	2,375,595	$400,336	16.9c	2,513,377	$386,953	15.4c	$453,858	18.1c
Adjustments:																	
Withdrawn from Menifee Field for Use in Menifee Compressor Station (D)	2,057	$202	9.8c	8,625	$726	8.4c	14,722	$1,681	11.4	6,146	$733	11.9c	13,973	$1,666	11.9c	$1,666	11.9c
Cost of Gas withdrawn from Menifee Field (See above under caption "Production") based on cost to Company at time put into storage	.....	9,294	.....	.....	24,555	.....	.....	6,014	.....	.....	.....	.....	.....	.....	.....	.....	.....
Total Adjustment	2,057	$9,092	.....	8,625	$25,281	.....	14,722	$7,695	.....	6,146	$733	.....	13,973	$1,666	11.9	$1,666	11.9c
Total Gas Available for Sale and Use, as adjusted	2,177,788	$343,924	15.8c	2,411,106	$377,408	15.7c	2,772,359	$426,657	15.4c	2,381,741	$401,069	16.8c	2,527,350	$388,619	15.4c	$455,524	18.0c

Note.—See following page for footnote.

[fol. 166-a-17] Notes Relative to Preceding Statement of Gas Production and Purchases

Note (A).—Some of the purchase gas contracts prescribe the price as percentage of the sales price of gas and consequently the cost of purchased gas is dependent upon the sale price. The contract with the United Fuel Gas Co. for the price of purchased gas is 50 per cent of the average domestic rate. The Bed Rock Petroleum Co. contract is 30 per cent of the average domestic rate. The Kentucky City Gas Co. contract is 35 per cent of the higest domestic rate, the purchased price per M. C. F. not to be less than 14 cents. The Hillsdale Gas Co. contract is 20 cents per M. C. F. plus ⅓ of any increase in domestic rate over 40 cents per M. c. f.

(B).—Amount withdrawn from Menifee storage field as shown on Company records.

(C).—According to Company's accounting method this 92,781 M. c. f. represented a part of the gas which had been put into storage in 1919 and the cost charged to expenses in that year; therefore no additional charge to expenses in 1922. To properly show the true expenses in 1922 this gas is priced at the cost to the Company, 9.8 cents per M. c. f., and included in this statement under adjustments.

(D).—Gas withdrawn from Menifee storage field is not metered but is computed on the basis of compressor capacity. This fails to account for gas used in operation of compressor which is considered also to have been withdrawn from Menifee field.

(E).—According to Company's accounting method this 291,625 M. c. f. represents gas which was stored in 1919 and in 1920 and which was charged to expenses in those years; consequently no additional charge was made to expenses in 1923. To properly show the true expenses in 1923 this gas is priced at the cost to the Company, 8.4 cents per M. c. f., and included in this statement under adjustments.

[fol. 166-a-18] (F).—Of this 390,594 M. c. f. the Company's accounting method showed that 66,838 M. c. f. represented gas which was purchased and stored in 1920, and 323,756 M. c. f. purchased and stored in 1921. The 66,838

M. c. f. had been charged to expenses in 1920 and consequently no additional charge was made in 1924; but the 323,756 M. c. f. represented gas stored in 1921 and carried as an asset on the Balance Sheet at 11.92 cents per M. c. f. Consequently when withdrawn from storage it was charged to expenses. To properly reflect the true expenses for 1923 the 66,838 M. c. f. was priced at cost to the Company and included in this statement under adjustments.

(G).—Under Company's accounting method, gas put into storage in Menifee Field each year is carried on the Balance Sheet as the lowest price gas it buys. Thus if it buys gas at prices ranging from 10 cents upward, the 10 cent gas is considered as that which is placed in storage rather than the average priced gas. During 1919 and 1920 gas put into storage was not carried on the Balance Sheet but was all charged to expenses during those years.

[fol. 166-a-19]

Central Kentucky Natural Gas Company, Inc.

Allocation of the Adjusted Cost of Gas Purchased to the Lexington District

Year	Entire system	Basis of allocation	Lexington district
1922	$343,924	Gas Sales—56.42%	$194,042
1923	377,408	Gas Sales—56.42%	212,934
1924	426,657	Gas Sales—56.42%	240,720
1925	401,069	Gas Sales—56.42%	226,283
1926 At 40c Rate	388,619	Gas Sales—56.42%	219,259
1926 At 50c Rate	455,524	Gas Sales—56.42%	257,007

[fol. 167] "The Witness: This Exhibit No. 4 sets forth the actual revenue and expenses of the Central Kentucky Natural Gas Company for the years 1922-1926, both inclusive. From the expenses, I wish to repeat, I have deducted the rentals paid the Lexington Utilities Company. That makes the earnings of the Central Kentucky Natural Gas Company that much larger than they actually were. The rental which was paid to the Lexington Utilities Company was in the neighborhood of $57,000.00 or $58,000 per year, more or less, and that has been taken out of the expenses, and to that extent, the net income is increased by that amount.

In this statement the gas for the years 1922 to 1925, inclusive, was sold at 40¢ per thousand cubic feet. Starting

in the year 1926, gas was sold at 50¢ per thousand cubic feet. Ten cents per thousand cubic feet of that amount, however, was impounded, but the Company, in setting up this operation report for that year, set it up so as to show what it would have received if that money which was impounded had been turned over to it. So, for the year 1926 we have two statements, one showing what the Company would have received at 40¢ and one showing what the Company would have received at 50¢ * * *.

[fol. 168] Now then, this report is divided into five major subdivisions (see page 2 of Exhibit No. 4):

1. Net Revenue Available for Return.
2. Summary of Revenue and Expenses.
3. Details of Gross Revenue.
4. Details of Expenses and Taxes.
5. Estimated Annual Allowance necessary for Amortization, depletion, extraordinary maintenance and contingencies.

On page 3 is the "Net Revenue of the Central Kentucky Natural Gas Company, Inc., Available for Return on Property of the Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., for the year 1926, with retail gas sales at 40¢ per M. c. f." The Company earned, after expenses and available for amortization, depletion, extraordinary maintenance, contingencies, interest and dividends, $322,911 on the entire system, and applicable to the Lexington District, $196,232. Deducting the estimated annual allowance necessary for amortization, depletion, extraordinary maintenance and contingencies, the net revenue available for return on the property used and useful for serving the consumers of the entire system was $120,643; and, in the Lexington district, $74,702.

On the next page there are the corresponding figures [fol. 169] based on the retail gas sales at 50¢. If the Company had obtained all of that revenue, instead of ten cents being impounded, it would have earned a revenue available for return on the entire system of $225,950, and in the Lexington District $156,724.

On page 5 is shown the same figures based on the average earnings of the Company from 1922 to 1926, inclusive, during which time the gas was sold at 40¢ except in the year 1926, but in that year and in this statement it is all predi-

cated on a sale of gas at 40¢, and the average over that period of revenue available for return on the entire property is $74,581 for the entire system, and $54,413 for the Lexington District.

Referring to the figures opposite the years 1922, 1923, 1924, 1925 and 1926, you will note that the year 1926 was considerably in excess of any of the previous four years. You residents of this locality probably recall that that year was an exceptionally cold year, and that was what caused this increase in 1926.

At this time we are not able to submit to you the figures for the year 1927. Those figures were made available to us only in the last few days, and it is our intention to get the figures and present them to you for your consideration. But I can state, the year 1927 being a much warmer year than is ordinarily experienced in this locality, the earnings will be found to be much less than appear on this sheet.

On page 6 you will find a summary of the details of the earnings and expenses which go to make up pages 3, 4 and 5. You will notice the first sub-heading is "Gross Revenue from Operation". That is all of the money that the Com- [fol. 170] pany took in from the sale of gas and from miscellaneous operations, which includes revenue from gasoline extractions and some shop revenues (that is, doing some work around consumers' premises), some interest on miscellaneous investments and other miscellaneous income. The total has ranged from a minimum of $750,127 in 1922 to $907,024 in 1926, during which period the rate was 40¢. With the rate of 50¢ in 1926 the Company would have taken in $1,097,496. From that, of course, is to be deducted all the expenses of operation which follow in the next series of items under the caption appearing at the left of the sheet "Operating Expenses". Here you will find the field and main line expenses, which is all the cost of operation at the Menifee Field and the Red Bush Field for operating and maintaining the wells, running the distribution stations and running the main lines.

Counsel: These are actual disbursements taken from the books?

The Witness: Yes, sir; actual disbursements taken from the Company's books. The next item is, "Operating Ex-

penses", which includes all the actual cost of distribution in Lexington and in the other cities served. It includes reading the meters, and expenses of that general character. Then follows the general expenses which include officers' salary, increasing the business, running the plant, etc., and other expenses of that kind.

The fourth item is "Gas Purchased". That represents what the Company has paid for gas sold to the consumers at Lexington, Winchester, Mt. Sterling and Paris, and to the wholesale consumers.

We then have a total of operating expenses ranging from a minimum of $455,379 in 1922 up to a maximum of $570,- [fol. 171] 552 in 1924, predicated on the sale price of gas being 40¢. With gas selling at 50¢ the Company's operating expenses increased, because of the contract with the other Companies supplying them with gas being predicated on the price at which they sell it. As stated a while ago, the Bed Rock Petroleum Company charges them 30% of the average of the rate which they charge for gas in their district. So that with gas selling at 60¢, it would have to pay the Bed Rock Petroleum Company 18¢, selling at 40¢ it would only pay the Bed Rock Petroleum Company 12¢.

We will carry this down into the net revenue before any payment of taxes, and on the next line are the taxes which apply in those respective years. We then find the net operating revenue available for amortization, depletion, extraordinary maintenance, contingencies, interest and dividends on those figures appearing under the respective years at the figures brought forward appearing on pages 3, 4 and 5. For example, on page 3 you will find the corresponding item of $322,911 for the entire system, which is the same figure that appears for the year 1926 on statement on page 6 at the 40¢ rate. Similarly the item on page 4 was brought forward on this statement; and several items for each of the respective years on page 5; and come right forward to page 6.

To the right of this statement on page 6, under the caption "Lexington District", is the allocation of revenue and expenses in the urban and suburban districts of Lexington and under the heading, "Gross Revenue from Operations." Of course, only that part which was earned in Lexington was carried forward to that part of the sheet. Any earn-

ings in Winchester or Mt. Sterling or by any wholesalers [fol. 172] is not considered in the set up for the Lexington District. Following these sheets are the details which support all the figures thereof.

The next sheet is page 7, which shows the totals of the sales of gas. Taking the year 1926 for an illustration, you will note that opposite the caption, "Lexington Urban", which appears on the left of the sheet, and under the heading, "1926", you will find sales of 1,218,312 M. c. f.

* * * * * * *

And for that gas the Company received 40¢, which multiplied times the gas (by the cubic feet) means that the Company earned the gross sum of $487,991.

The next line is the same series of figures for the suburban district of Lexington and following under that you will find the corresponding figures for Winchester and Mt. Sterling; and still further down the sheet, the sales of gas to the Frankfort, Kentucky, Natural Gas Company, the Kentucky Utilities Company, the Blue Grass Natural Gas Company and others; also the Johnson County Gas Company, but that ceased to take gas from this Company in the year 1922. So that the total under the year 1926, based on the sale of gas at 40¢, was 2,312,309 M. c. f., at an average of 38.3¢, resulting in total receipts to the Company of $887,551.

In the next series of three columns under the caption, "1926-B" are what the Company would have earned if it had been permitted to retain all of the receipts at 50¢; and [fol. 173] that, in turn, results in the figure of $1,078,023. These figures correspond exactly with the figures on page 6 opposite, "Total Gas Sales". If you will look on that page on the entire system, for the year 1926, first at the 40¢ rate, you will find the figure of $887,551, which is the figure more fully detailed on page 7 and which I have just described.

On page 8 we show an allocation of that gross revenue to the Lexington District, and that simply involves assigning to the Lexington District all of the money earned in that District, which is the sales to the urban and suburban territory of Lexington. And at the bottom of that sheet we have assigned also to the Lexington District (although

the sales are not right in the District) we credit that District with the sales of gasoline, which is revenue derived from a Company which takes gas and extracts from it the gasoline content, and pays the Central Kentucky Company a fee for doing that, so we credit the Lexington District with revenue from that source to the extent of 56.42%, that being the ratio that you recall that I described a while ago to the sales in Lexington as compared to the total sales of the Company.

The next item is "Revenue from Shop Work", which is allocated on the basis that the number of meters in Lexington bear to the total number of meters owned by the Company, which is 73.41%. The gas sales are allocated on the basis of 56.42%. So, on that basis we have sums shown under the caption, "Lexington District", for each of the respective years, ranging from $433,949 in 1922, up to $540,906 in 1924, during which period the sale of gas was at the rate of 40¢; but if it had been at 50¢ the receipts applicable to the Lexington District for the year 1926 would [fol. 174] have been as shown in the last column, $664,530.

* * * * * * *

[fol. 175] Starting on page 10 is a brief statement as to the operating expenses, the details of which follow.

On page 11 are the "Field and Main Line Expenses", broken down into such details as the Company reports it. The major subdivisions of this property are "General", which includes "damages", "Cost of obtaining Leases, rentals, rentable land, royalties", and that class of expenses listed there; and the next subdivision is the expenses in connection with "wells"; the next one is in connection with the "Lines", both the field lines and the main lines, but not the distribution lines in the City. The next is "Pump Station", that is the compressor station.

The total of those expenses included in this set-up by Ford, Bacon & Davis are the amounts opposite that caption, which ranges from $34,159 in 1922, up to $52,265 in 1924.

* * * * * * *

[fol. 176] The next sheet, page 12, shows the total of the "City Plant Expenses". Those are the expenses in con-

nection with the distribution of gas at Lexington, Mt. Sterling and Winchester; and by that I mean in the urban and suburban districts of those places. This is subdivided into three major headings,—"Lines", "Shop" and "Office"; [fol. 177] and it shows the actual out of pocket expenses of the Company operating the Company under these three major subdivisions; and you will note towards the bottom of the sheet the title "City Plant Expenses" used by Ford, Bacon & Davis, which in 1922 were $47,476, and which increased to $61,900 in 1926.

Immediately below that is the "Plant Rental Expense" paid to the Lexington Utilities Company on each of those years, and any one referring to the Company's books would find the figure shown at the bottom of the sheet opposite the caption, "Total City Plant Expense per Company's Report", $97,858, which is inclusive of that rental, but which I have not included in the expenses since we have included the property with the Central Kentucky property on which the consumers should pay a return.

To the right of this sheet is the allocation to the Lexington District. Perhaps I should not have used the term "allocation", because these expenses are actual. The Company keeps the expenses of the Lexington property separate from the Mt. Sterling and Winchester property, so that these figures are actual and are not allocations.

Page 13 is a detail of the "General Expenses" of the Company, and you will note that these comprise salaries and expenses of officers and superintendents; general office expenses (salaries, transportation, etc.); private telephone and telegraph lines; that is, a portion of their private lines; repairs to the buildings, and miscellaneous expenses as shown; and the items included in this by Ford, Bacon & Davis are the amounts shown opposite that statement, and range from a minimum of $26,036 in 1923 to a maximum of $43,845 in 1925. The Company's books show that amount [fol. 178] at the bottom of that page. They included under the caption "General Expenses" interest and exchange, which I have taken out. They include taxes which I treat in a lump sum later. They include rate case expenses and appraisals, which involves and includes the fees paid to Ford, Bacon & Davis and attorneys, which I have deleted, and the reason I delete that expense is because I have in-

cluded in the valuation an allowance of $50,000.00 as the cost of obtaining the present franchise; therefore, you cannot naturally include it in the valuation and the expenses too.

Opposite "Interest and Exchange" there are amounts varying from $2,057 up to a maximum of $19,613. The Company, no doubt, has notes payable on which they have to pay interest. That is return on the property, and I am attempting to show how much revenue there is available for return and consequently I can't deduct that, for I would be mis-stating the facts if I did, and stated that the result was the amount available for return.

Under the sub-heading of "Adjustments" there are a few minor accounts here, such as "Bad Gas" and "Shop Accounts", amounting to a few hundred dollars a year, which the Company has been in the practice of charging off through their profit and loss account, and which I have included in the general expenses; so that, instead of my inclusion of $60,375 as general expenses shown under the year 1922 at the bottom of the sheet, I have used $29,820, and that figure has been carried forward to page 6, which is the general summary statements, and appears opposite the caption, "General Expenses."

On the right of this sheet are these expenses allocated [fol. 179] to the Lexington District. The salaries and expenses of the officers and superintendents have been allocated to the Lexington District in the same ratio we obtained for the summation of the "Field and Main Line Expense," shown on page 11, and the "City Plant Expense" shown on page 12. That resulted in assigning 57.96% of the salaries and expenses of the officers and superintendent to the Lexington District.

This same basis was used for allocating to the Lexington District the general office expenses and salaries, rent, stationery, etc., which figures the same percentage, 57.96%.

The telephone and telegraph lines is allocated in the proportion in which the sales of gas in Lexington bore to the sales of gas in the entire system, or 56.42%.

Similarly, the repairs to buildings was allocated on that same basis, to-wit, 56.42%.

Miscellaneous expenses here have been allocated on the basis of the other expenses, or 57.96%.

Interest on meter deposits, bad gas and shop accounts, and unclaimed meter deposits were all allocated in the proportion in which the consumers in the Lexington District bore to the consumers in the entire system.

The derivation of the percentage for allocated expenses is shown in the lower right-hand corner of page 13, where we have added up the "Field and Main Line Expenses", "Gas Purchased" and "City Plant Expenses" for the entire system, and we find that the expense assigned to Lexington was assigned in the ratio of 57.96%.

[fol. 180] On page 14 is the total of the cost to the Company of the gas which it has purchased from various producers for re-sale to the various consumers in Lexington, Mt. Sterling, Winchester and Paris, and this is set forth from 1922-1926, both inclusive. To illustrate that statement, on the left hand side of the sheet appear all the Companies from whom the Central Kentucky Company had purchased its supply of gas. The first one illustrated there is the "United Fuel Gas Company", which supplied 1,501,323 M. c. f. of gas during the year 1922, at a cost to the Central Kentucky Natural Gas Company of $260,247, which was an average of 17.3¢ per thousand cubic feet.

In the next year it supplied the amount shown there at an average of 20¢. That same condition prevailed for each of the succeeding years, and when you get to 1926, the United Fuel Gas Company supplied in that year 955,126 M. c. f. of gas at a cost of $191,025, based on the rate being paid of 40¢ in Lexington. If the Company had received the whole 50¢ which was charged the consumer, it would then have had to pay to the United Fuel Gas Company $238,781 or at the rate of 25.04¢. The contract with the United Fuel Gas Company calls for a payment to it equivalent to fifty per cent (50%) of the rate at which the gas is sold to consumers of the Company; so that with a 60¢ rate in Lexington the payment to the United Fuel Gas Company, under the contract, would be 30¢. Under the 40¢ rate, which did prevail, the payment to them was 20¢ per thousand cubic feet.

The next company under this schedule here which supplies gas is the "Kentucky Cities Gas Company". A footnote on page 15 describes in a general way the basis of pay-
[fol. 181] ment to these companies, under "Note A". I will state there that some of the purchased gas contracts

prescribe the price as a percentage of the sales price of gas; consequently, the cost of purchased gas is dependent on the sale price of it; in other words, upon the price at which the Central Kentucky Natural Gas Company distributes gas to its consumers is determined the price, under the contract, which it has to pay the producers. Under the contract with the United Fuel Gas Company the price of purchased gas is 50% of the selling price to the consumer. The contract with the Bed Rock Petroleum Company is 30%. The Kentucky Cities Gas Company contract as stated in this note, is in error, because a subsequent letter at the time it was written did not come to my attention, and where it states in this note that the "contract is 35% of the highest domestic rate, the purchase price per M. c. f. not to be less than 14¢", that should read that the Kentucky Cities Gas Company contract is 17½¢ plus ¼ of any increase of the domestic rate in excess of 40¢; so that with a 60¢ rate the Kentucky Cities Gas Company would be paid 17½¢ plus 5¢, or 22½¢.

The Hillsdale Gas Company's contract is 20¢ per M. c. f., plus ⅓ of any increase in the domestic rate over 40¢ per M. c. f. So that under that contract, under the 60¢ rate, the Central Kentucky Natural Gas Company would have to pay to the Hillsdale Gas Company ⅓ of 20¢, plus 20¢, or 26.7¢ per thousand cubic feet.

Now, the statement on page 14 shows the amounts in cubic feet and in dollars paid to each of the companies from whom the Central Kentucky Natural Gas Company bought its gas for those years; and you will note that they had purchased, for example, in the year 1922, 2,857,999 M. c. f. [fol. 182] of gas, at a total cost of $406,650, or an average of 14.2¢. Similarly, in 1926, predicated on a 50¢ rate in Lexington, they bought 2,607,861 M. c. f. of gas, at a total cost of $432,701, an average of 16.6¢. If they had paid for that gas on the basis of the 50¢ rate in Lexington, the cost would have been $509,794, or an average of 19.5¢. If the Company is granted the increase which it asks for it will have to reimburse these companies from whom it has bought the gas for the difference between what it did pay under the 40¢ rate, $432,701, and $509,794.

* * * * * * *

The next item on that sheet, under the title, "Gas Purchased", is the "Amount of Gas Stored in the Menifee Field". I have described heretofore how the Company lets the gas flow back into that field during the summer months and withdraws it in the winter months to meet the demand, and this is the excess in the summer over what is withdrawn in the winter. That isn't quite right. This is the total amount which is permitted to flow into the field. I see I have the amount of withdrawals in the next item.

Under the Company's accounting practice, it assumes that the gas which it permits to flow into that field is the lowest priced gas which it buys. In 1926 you will see that they paid all the way from 9.3¢ per thousand up to 13.4¢ per thousand — that it sold; and it has assumed that it will exhaust all the ten cent gas, and when that is exhausted it puts in the eleven cent gas, if it bought any at that rate, and the twelve cent, and so on, until it has put into the field all the lowest priced gas, and carries that as an asset. It could very easily assume that the field contained an average priced gas, but it has simply adopted that means [fol. 183] of accounting—

. . . . . .

And in accordance with their accounting, if the retail price of gas in Lexington has been 50¢, then the gas which was stored in the field would have represented an investment of $112,433, shown in the second column from the right, or an average of 14.3¢. Deducting the gas stored in the field then leaves the figures opposite the caption, "Net Available Purchased Gas", which, to use 1926 as an illustration, was 1,819,261 M. c. f., at a cost of $330,456, based on the 40¢ rate. In addition to that, the Company withdrew from the Menifee Field during the winter months, the amount of 473,968 M. c. f.,

. . . . . .

which stood them on their books $56,497, or an average of 11.9¢.

They produced in the Red Bush Field in the same year [fols. 184 & 185] 220,148 M. c. f., and inasmuch as we have included all of the expenses in connection with that production under the previous expenses of "Field and Main Line Expenses", there is no further additional expense included

here. So that the withdrawal from the Menifee Field and the production from the Red Bush Field in the year 1926 was 694,116 M. c. f., which made available for sale and use by the Company of 2,513,377 M. c. f. So that the gas available for sale and use as carried on the Company's statements to operating expenses amounted to $386,953 with gas selling in Lexington at 40¢. At 50¢ the operating expenses would have been, according to the Company, $453,858.

The Company in its measurement of gas withdrawn from the Menifee Field computes that amount based on the capacity of its compressor. It does not meter that gas, but that can be rather correctly computed through the capacity and hours of operation of that compressor. * * * Consequently I have made an adjustment and have added to the bottom of this statement, "Gas Withdrawn from Menifee Field for Use in Menifee Compressor Station," which was in the year 1926, 13,973 M. c. f. at an average cost of 11.9¢ per thousand cubic feet, or a total of $1,666. And I therefore carried as an operating expense in the year 1926 the figure at the bottom of the page, $388,619. That figure you will find on page 6 opposite the caption, "Gas Purchased" and with gas selling at 50¢ in Lexington, the corresponding figure would be $455,524.

* * * * * * *

[fols. 186-189] Pages 15 and 16 are merely notes in explanation of the statement on page 14, and I won't bother to go over all of them. They speak for themselves.

On page 17 is an allocation of the gas purchased to the Lexington District, and it is all done in the ratio that the sales in Lexington bear to the sales in the entire system.

Mr. Duncan: I will ask you, Mr. Kimball, to file with the Commission exhibit which I will ask to have identified as "Company Exhibit No. 6".

[fol. 189-a] [File endorsement omitted]

COMPANY EXHIBIT No. 6

[fol. 189-b] Estimate of Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., with Proposed Retail Rate of 60 Cent Minimum Charge, Including First 100 Cu. Ft. per Month; 6 Cents per 100 Cu. Ft. for Next 4,900 Cu. Ft. Per Month; 50 Cents Per M. c. f. for All Over 5,000 Cu. Ft. per Month

February 10, 1928

Ford, Bacon & Davis, Incorporated, Engineers, New York, Philadelphia, Chicago, San Francisco, New Orleans

[fol. 189-a-1] Estimate of net Revenue under the Proposed Rate Available for Return on Property of the Central Kentucky Natural Gas Company and Lexington Utilities Company, Inc.

February 10, 1928

This exhibit shows an estimate of the net revenue available for return on the property of the Central Kentucky Natural Gas Company, Inc., and the Lexington Utilities Company, Inc., based on the proposed rate of:

60 cents minimum charge including first 100 cubic feet per month;

6 cents per 100 cubic feet for the next 4,900 cubic feet per month; and

50 cents per M. c. f. for all over 5,000 cubic feet

The first statement shows the estimate and the succeeding statements contain the supporting detailed figures.

The estimate of gas sales, in cubic feet, is based on the number of consumers taking gas during the year 1927 and on the consumption per consumer during that year after making correction for temperature conditions and for decrease in sales resulting from the higher proposed rate.

The temperature during the winter months of the year 1927 was higher than the average with the result that the quantity of gas sold in that year was less than would have been the case if the temperature had been normal. It is estimated that with normal temperature the sales would have been 6 per cent greater.

Comparing the sales per consumer in 1926 and 1927 when the rate was 50 cents per M. c. f., with the sales per con- [fol. 189-a-2] sumer in each of the previous five years when the rate was 40 cents per M. c. f., and giving effect to differences in temperature, it is found that the increase in rate from 40 cents to 50 cents resulted in a decrease in the quantity of gas sold per consumer of from 11.9 per cent to 15.4 per cent. It is estimated that the proposed rate which will average about 60 cents per M. c. f., but which provides for a charge of 50 cents per M. c. f., for all over 5,000 cu. ft. per month, will result in a decrease of 7.5 per

cent in the sales of gas per consumer as compared with sales under the 50 cent flat rate. An increase from 50 cents to a flat rate of 60 cents no doubt would result in a larger reduction than 7.5 per cent.

Expenses are estimated at an average of the annual expenses for the years ended December 31, 1924, 1925 and 1926.

The estimated cost of gas purchased for resale is based upon existing purchase gas contracts. These include the contract with the Petroleum Exploration Company, Inc., which requires the Central Kentucky Company to take 750 million cubic feet per year at 40 cents per M. c. f. delivered at the Lexington City Gate. There are also contracts with the United Fuel Gas Company, Hillsdale Gas Company, Bed Rock Petroleum Company, Carroll Oil & Gas Company, Kentucky City Gas Company, and numerous smaller producers. The prices under many of these contracts are a function of the retail sales price of gas so that with an increase in rate there results also an increase in the cost of gas purchased.

In the estimates of expenses nothing has been included to cover the rental paid by the Central Kentucky Natural Gas Company, Inc., to the Lexington Utilities Company, [fol. 189-a-3] Inc., for the use of the latter's distribution system, inasmuch as the properties of these two companies have been included in the valuation on which the return is computed.

The annual allowance necessary for amortization, depletion, extraordinary maintenance and contingencies is based on amortizing the estimated cost of reproduction new less deterioration of the properties over a period of twenty years with interest accumulations at 3½ per cent. The extraordinary maintenance is an amount estimated to be necessary to keep the property in its present physical condition for the duration of its service life. The allowance for contingencies, $10,000 for the entire property and $5,600 allocated to Lexington, is included to insure the company against extraordinary loss from explosions and similar extraordinary charges.

Franchise and tangible property taxes are estimated at the average for the three years, 1924, 1925 and 1926. The Federal Income Tax is estimated at 13½ per cent of the net revenue after all charges except amortization.

Central Kentucky Natural Gas Company, Inc.

Estimate of Net Revenue Available for Return with proposed Retail rate of:
(a) 60 cent Minimum Charge, including first 100 cu. ft. per Month
(b) 6 cents per hundred cubic feet for next 4,900 cu. ft. per Month
(c) 50 Cents per M. c. f. for All over 5,000 cu. ft. per Month

	Entire system	Basis of allocation	Lexington district
Gross Revenue from Operations:			
Gas Sales:			
Lexington-Urban and Suburban	$691,670	Location	$691,670
Winchester and Mt. Sterling	235,891	"	.....
Wholesale Sales	194,755	"	.....
Total Gas Sales	$1,122,316		$691,670
Gasoline	9,251	Gas Sales—56.42%	5,220
Shop	4,942	Number of Meters—73.41%	3,628
Interest	555	Gas Sales—56.42%	314
Miscellaneous	787	Gas Sales—56.42%	444
Total Gross Revenue	$1,137,851		$701,276
Operating Expenses:			
Field and Main Line Expense	50,450	Gas Sales—56.42%	28,464
City Plant Expense	61,841	Location	41,946
General Expense	37,333	Other Expenses and consumers	21,839
Gas Purchased	673,250	Gas Sales—56.42%	379,848
Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	202,268		121,530
Total Operating Expense	$1,025,142		$593,627
Net Revenue before Taxes	$112,709		$107,649
Taxes	57,512		34,636
Net Revenue Available for Return	$55,197		$73,013

[fol. 189-a-5] Central Kentucky Natural Gas Company, Inc.

Estimated Gas Sales (M. c. f.) and Revenue for the Entire System and Proportion Allocated to Lexington District, Giving Effect of Proposed Retail Rate and Mean Temperature from 1906 to 1926, Inc.

	Entire system				Lexington district		
	Total sales (M. c. f.)	Average rate per M. c. f.	Revenue	Basis of allocation	Total sales (M. c. f.)	Average rate per M. c. f.	Revenue
Retail Sales:							
Lexington District	1,152,150	$.60	$691,670	Location	1,152,150	$.60	$691,670
Winchester	248,451	.60	149,071	"			
Mt. Sterling	144,700	.60	86,820	"			
Total Retail Sales	1,545,301		$927,561		1,152,150		$691,670
Wholesale Sales:							
Frankfort Ky. Nat. Gas Co	323,932	.35	113,376				
Ky. Utilities Co	166,590	.45	74,966				
Blue Grass Nat. Gas Co	14,251	.45	6,413				
Total Wholesale Sales	504,773		$194,755				
Total Sales	2,050,074		$1,122,316		1,152,150		$691,670

(Here follow side folios 189-a-6 and 189-a-7)

[fol. 189-a-6]

Central Kentucky Natural Gas Company, Inc.

Estimated Gas Sales (M. c. f.) and Revenue in Lexington District under proposed Rate of:
(a) 60 cents Minimum Charge including 100 cu. ft. per Month
(b) 6 cents per hundred cubic feet for next 4,900 cu. ft. per Month
(c) 50 cents per M. c. f. for All over 5,000 cu. ft. per Month

(This estimate is based on the actual number of consumers and gas sales for the year Ended Dec. 31, 1927, but correcting the sales to reflect mean temperature from 1906 to 1926, inclusive.)

Classification of bills rendered by amounts of gas billed (M. c. f.) (1)	No. of monthly bills rendered: Year ended Dec. 31, 1926 (2)	Per cent of total (3)	Year ended Dec. 31, 1927, prorated on 1926 percentages (4)	Estimated sales predicated on proposed rate and mean temperature 1906 to 1926, inclusive (M. c. f.) (5)	Estimated Gas Sales and Revenue by Classification of Bills Rendered: Minimum monthly charge of 60 cents, such minimum charge to include without further charge the first 100 cu. ft. of gas used — Gas sales (M. c. f.) (6)	Revenue (7)	Next 900 cu. ft. at 6 cents per 100 cu. ft. — Gas sales (M. c. f.) (8)	Revenue (9)	Next 4,000 cu. ft. at 60 cents per M. c. f. — Gas sales (M. c. f.) (10)	Revenue (11)	All over 5,000 cu. ft. at 50 cents per M. c. f. — Gas sales (M. c. f.) (12)	Revenue (13)	Total Revenue (14)
0	7,221	6.01%	7,418	.....	.....	$4,451	.....	.....	.....	.....	.....	.....	$4,451
1	7,435	6.19	7,638	7,638	763.8	4,583	6,874.2	$4,124	.....	.....	.....	.....	8,707
2	10,432	8.69	10,717	21,434	1,071.7	6,430	9,645.3	5,787	10,717	$6,430	.....	.....	18,647
3	10,701	8.91	10,994	32,982	1,099.4	6,596	9,894.6	5,937	21,988	13,193	.....	.....	25,726
4	9,476	7.89	9,735	38,940	973.5	5,841	8,761.5	5,257	29,205	17,523	.....	.....	28,621
5	7,874	6.56	8,089	40,445	808.9	4,854	7,280.1	4,368	32,356	19,414	.....	.....	28,636
6	6,959												
7	6,072												
8	5,196												
9	4,530	55.75	68,775	1,010,711(A)	6,877.5	41,265	61,897.5	37,139	275,100	165,060	666,836	$333,418	576,882
10	4,215												
11 to 15	15,909												
16 to 25	14,508												
over	9,557												
Total	120,085	100.00%	123,366	1,152,150	11,594.8	$74,020	104,353.2	$62,612	369,366	221,620	666,836	$333,418	691,670

Note—(A) Estimated Gas Sales to the Consumers taking 6 M. c. f. and over, i.e. (1,010, 711 M. c. f.), is the difference between the total estimated sales and the sales to the Consumers taking from 0 to 5 M. c. f.

Average Rate per M. c. f. (691,670÷1,152,150 M. c. f.)—$0.60.

Col. (6)—Col. (4) times 100 cu. ft.
Col. (7)—Col. (4) times 60 cents.
Col. (8)—Col. (4) times 900 cu. ft.
Col. (9)—Col (8) times 60c per M. c. f.
Col. (10)—Col. (1) minus 1,000 cu. ft. times Col. (4).
Col. (11)—Col. (10) times 60 cents per M. c. f.
Col. (12)—Col. (5) less Col. (4) times 5,000 cu. ft.
Col. (13)—Col. (12) times 50 cents per M. c. f.

[fol. 189-a-7]

Central Kentucky Natural Gas Company, Inc.

Total Gas Consumption, Number of Consumers, Consumption per Consumer, and Mean Monthly Temperature from 1920 to 1927, Inclusive, Lexington

Month	Mean temperatures, 1906 to 1926, inclusive	1920 Total consumption (M. c. f.)	1920 Number of consumers	1920 Consumption per consumer (M. c. f.)	1920 Mean temperature	1921 Total consumption (M. c. f.)	1921 Number of consumers	1921 Consumption per consumer (M. c. f.)	1921 Mean temperatures	1922 Total consumption (M. c. f.)	1922 Number of consumers	1922 Consumption per consumer (M. c. f.)	1922 Mean temperature
January	34.1°	149,858	6,622	22.6	30.1°	143,363	7,191	19.9	37.4°	158,109	7,607	20.8	
February	34.9	123,882	6,646	18.6	32.6	130,860	7,198	18.2	38.2	142,601	7,621	18.7	
March	44.3	127,566	6,667	19.1	44.7	113,408	7,223	15.7	54.6	140,679	7,652	18.4	
April	54.0	92,004	6,713	13.7	49.7	83,380	7,252	11.5	57.5	79,215	7,699	10.3	
May	63.5	64,995	6,724	9.7	62.4	62,879	7,270	8.6	64.9	60,318	7,727	7.8	
June	72.3	37,503	6,770	5.5	71.3	34,685	7,295	4.8	76.2	40,464	7,780	5.2	
July	75.8	30,897	6,812	4.5	74.4	29,170	7,343	4.0	80.2	34,864	7,812	4.5	
August	74.6	31,982	6,865	4.7	72.2	32,739	7,379	4.4	74.6	35,300	7,878	4.5	
September	69.5	36,014	6,935	5.2	69.9	34,627	7,430	4.7	73.2	39,164	7,965	4.9	
October	57.6	53,907	7,016	7.7	62.1	74,086	7,498	9.9	56.8	71,129	8,065	8.8	
November	45.1	109,899	7,083	15.5	43.3	106,650	7,555	14.1	48.0	102,163	8,133	12.6	
December	35.3	144,772	7,159	20.2	36.2	139,267	7,589	18.4	38.9	166,187	8,179	20.3	
Total		1,003,279	82,012	147.0		985,114	88,223	134.2		1,070,193	94,118	136.8	

Month	1924 Total consumption (M. c. f.)	1924 Number of consumers	1924 Consumption per consumer (M. c. f.)	1924 Mean temperature	1925 Total consumption (M. c. f.)	1925 Number of consumers	1925 Consumption per consumer (M. c. f.)	1925 Mean temperatures	1926 (A) Total consumption (M. c. f.)	1926 (A) Number of consumers	1926 (A) Consumption per consumer (M. c. f.)
January	201,355	8,980	22.4	29.5°	206,475	9,625	21.5	32.8°	207,650	10,055	20.7
February	178,716	9,002	19.9	33.4	154,368	9,650	16.0	43.0	153,859	9,965	15.4
March	179,041	9,036	19.8	39.1	146,768	9,670	15.2	46.6	178,242	9,986	17.8
April	119,005	9,053	13.1	54.9	98,254	9,691	10.1	59.2	138,464	9,719	14.2
May	89,107	9,102	9.8	58.2	83,471	9,723	8.6	59.8	77,403	9,735	8.0
June	52,650	9,157	5.7	73.0	49,492	9,737	5.1	75.8	48,845	9,730	5.0
July	41,785	9,214	4.5	73.2	39,853	9,743	4.1	75.0	39,435	9,743	4.0
August	38,687	9,265	4.2	75.1	39,105	9,798	4.0	76.2	36,229	9,781	3.7
September	50,883	9,387	5.4	63.7	38,212	9,838	3.9	76.2	42,474	9,891	4.3
October	76,366	9,488	8.0	62.4	92,497	9,964	9.3	50.2	73,050	10,003	7.3
November	112,337	9,569	11.7	45.0	140,283	10,012	14.0	43.2	142,957	10,056	14.2
December	185,181	9,605	19.3	34.0	186,240	10,034	18.6	31.8	165,294	10,101	16.4
Total	1,325,113	110,858	143.8		1,275,018	117,485	130.4		1,303,902	118,765	131.0

Note.—Number of Consumers used above is the total Meters on the gas ledger on the last day of the respective months; this represents the number of meter accounts less meters removed during the
Temperatures obtained from U. S. Dept. of Agriculture, Weather Bureau, Climatological Data for the State of Kentucky.
(A) Retail Rate in Lexington—50 cents per M. c. f.
(B) Retail Rate in Lexington—50 cents per M. c. f. until December when it was increased to 60 cents per M. c. f.

Central Kentucky Natural Gas Company, Inc.

Gas Consumption, Number of Consumers, Consumption per Consumer, and Mean Monthly Temperature from 1920 to 1927, Inclusive, Lexington District

1920			1921				1922				1923			
mber of umers	Consumption per consumer (M. c. f.)	Mean temperature	Total consumption (M. c. f.)	Number of consumers	Consumption per consumer (M. c. f.)	Mean temperatures	Total consumption (M. c. f.)	Number of consumers	Consumption per consumer (M. c. f.)	Mean temperatures	Total consumption (M. c. f.)	Number of consumers	Consumption per consumer (M. c. f.)	Mean temperature
,622	22.6	30.1°	143,363	7,191	19.9	37.4°	158,109	7,607	20.8	32.6°	177,190	8,253	21.5	39.1°
,646	18.6	32.6	130,860	7,198	18.2	38.2	142,601	7,621	18.7	38.2	167,585	8,328	20.1	31.6
,667	19.1	44.7	113,408	7,223	15.7	54.6	140,679	7,652	18.4	46.8	162,235	8,389	19.3	42.6
,713	13.7	49.7	83,380	7,252	11.5	57.5	79,215	7,699	10.3	57.0	123,930	8,396	14.8	53.3
,724	9.7	62.4	62,879	7,270	8.6	64.9	60,318	7,727	7.8	68.4	77,733	8,435	9.2	63.0
,770	5.5	71.3	34,685	7,295	4.8	76.2	40,464	7,780	5.2	74.6	45,279	8,492	5.3	74.0
,812	4.5	74.4	29,170	7,343	4.0	80.2	34,864	7,812	4.5	75.8	37,523	8,528	4.4	76.6
,865	4.7	72.2	32,739	7,379	4.4	74.6	35,300	7,878	4.5	74.7	38,377	8,584	4.5	74.4
,935	5.2	69.9	34,627	7,430	4.7	73.2	39,164	7,965	4.9	72.7	45,795	8,639	5.3	69.0
,016	7.7	62.1	74,086	7,498	9.9	56.8	71,129	8,065	8.8	61.0	80,339	8,771	9.2	56.2
,083	15.5	43.3	106,650	7,555	14.1	48.0	102,163	8,133	12.6	47.2	131,186	8,861	14.8	44.8
,159	20.2	36.2	139,267	7,589	18.4	38.9	166,187	8,179	20.3	39.1	153,910	8,915	17.3	45.2
,012	147.0		985,114	88,223	134.2		1,070,193	94,118	136.8		1,241,082	102,591	145.7	

1924			1925				1926 (A)				1927 (B)			
,980	22.4	29.5°	206,475	9,625	21.5	32.8°	207,650	10,055	20.7	32.0°	178,664	10,123	17.6	33.4°
,002	19.9	33.4	154,368	9,650	16.0	43.0	153,859	9,965	15.4	37.3	134,174	10,130	13.2	43.4
,036	19.8	39.1	146,768	9,670	15.2	46.6	178,242	9,986	17.8	39.7	134,741	10,161	13.3	47.8
,053	13.1	54.9	98,254	9,691	10.1	59.2	138,464	9,719	14.2	49.0	107,516	10,165	10.6	55.4
,102	9.8	58.2	83,471	9,723	8.6	59.8	77,403	9,735	8.0	64.6	77,790	10,171	7.6	63.4
,157	5.7	73.0	49,492	9,737	5.1	75.8	48,845	9,730	5.0	69.4	53,697	10,188	5.3	68.8
,214	4.5	73.2	39,853	9,743	4.1	75.0	39,435	9,743	4.0	76.8	39,834	10,201	3.9	75.2
,265	4.2	75.1	39,105	9,798	4.0	76.2	36,229	9,781	3.7	76.0	42,701	10,256	4.2	69.4
,387	5.4	63.7	38,212	9,838	3.9	76.2	42,474	9,891	4.3	71.4	48,246	10,357	4.7	72.2
,488	8.0	62.4	92,497	9,964	9.3	50.2	73,050	10,003	7.3	57.2	78,498	10,474	7.5	61.0
,569	11.7	45.0	140,283	10,012	14.0	43.2	142,957	10,056	14.2	40.8	111,718	10,527	10.6	49.7
,605	19.3	34.0	186,240	10,034	18.6	31.8	165,294	10,101	16.4	35.0	168,375	10,613	15.8	35.0
,858	143.8		1,275,018	117,485	130.4		1,303,902	118,765	131.0		1,175,954	123,366	114.3	

Meters on the gas ledger on the last day of the respective months; this represents the number of meter accounts less meters removed during the month plus all meters in service but idle during the month.
re, Weather Bureau, Climatological Data for the State of Kentucky.

til December when it was increased to 60 cents per M. c. f.

[fol. 189-a-8] Central Kentucky Natural Gas Company, Inc.

Calculation of Variation in Gas Consumption per Consumer per Degree Variation in Temperature—Retail Gas Sales at 40 cents per M. c. f.
Lexington District

	Actual Consumption per Consumer (Cu. Ft:)							
							1920 to 1925 Inc.	
Month:	1920	1921	1922	1923	1924	1925	Total	Average
January (Winter month)	22,600	19,900	20,800	21,500	22,400	21,500	128,700	21,450
February "	18,600	18,200	18,700	20,100	19,900	16,000	111,500	18,583
March "	19,100	15,700	18,400	19,300	19,800	15,200	107,500	17,917
April "	13,700	11,500	10,300	14,800	13,100	10,100	73,500	12,250
May	9,700	8,600	7,800	9,200	9,800	8,600	53,700	8,950
June (Summer month)	5,500	4,800	5,200	5,300	5,700	5,100	31,600	5,267
July "	4,500	4,000	4,500	4,400	4,500	4,100	26,000	4,333
August "	4,700	4,400	4,500	4,500	4,200	4,000	26,300	3,383
September "	5,200	4,700	4,900	5,300	5,400	3,900	29,400	4,900
October	7,700	9,900	8,800	9,200	8,000	9,300	52,900	8,817
November (Winter month)	15,500	14,100	12,600	14,800	11,700	14,000	82,700	13,783
December "	20,200	18,400	20,300	17,300	19,300	18,600	114,100	19,017
Total	147,000	134,200	136,800	145,700	143,800	130,400	837,900	139,650
Average	12,250	11,183	11,400	12,142	11,983	10,867	69,825	11,638
Total Consumption for Winter Months	109,700	97,800	101,100	107,900	106,200	95,400	618,000	103,000
Average Consumption for Winter Months	18,283	16,300	16,850	17,967	17,700	15,900	103,000	17,167
Total Consumption for Summer Months	19,900	17,900	19,100	19,500	19,800	17,100	113,300	18,883
Average Consumption for Summer Months	4,975	4,475	4,775	4,875	4,950	4,275	28,325	4,721
Difference (Assumed as Heating Load)	13,308	11,825	12,075	13,092	12,750	11,625	74,675	12,446
Temperature for Summer Months	287	304	299	294	285	393	1,772	295
Average Temperature for Summer Months	72	76	75	73	71	76	443	73.8
Temperature for Winter Months	237	275	261	257	236	257	1,523	254
Average Temperature for Winter Months	39	46	44	43	39	43	254	42.3
Difference in Average Temperature	33	30	31	30	32	33	189	31.5
Cu. Ft. per Degree in Temperature	403	394	389	436	398	352	2,372	395

(Here follow side folios 189-a-9 and 189-a-10)

[fol. 189-a-9]

Central Kentucky Natural Gas Company, Inc.

Consumption per Consumer, 1920 to 1925, Inclusive, Corrected According to Mean Monthly Temperature, with Gas Retailing at 40 cents per M. c. f.—Lexington District

Month	Mean temperature 1906 to 1926 inclusive (degrees)	1920 Temperature Actual	1920 Temperature Correction	1920 Consumption per consumer Actual (cu. ft.)	1920 Consumption per consumer Correction @ 400 cu. ft. per degree	1920 Consumption per consumer Corrected Total (cu. ft.)	1921 Temperature Actual	1921 Temperature Correction	1921 Consumption per consumer Actual (cu. ft.)	1921 Consumption per consumer Correction @ 400 cu. ft. per degree	1921 Consumption per consumer Corrected total (cu. ft.)	1922 Temperature Actual	1922 Temperature Correction	1922 Consumption per consumer Actual (cu. ft.)	1922 Consumption per consumer Correction @ 400 cu. ft. per degree
January (A)	34.1	30°	−4.1°	22,600	−1,640	20,960	37°	+ 2.9°	19,900	+ 1,160	21,060	33°	−1.1°	20,800	− 440
February (A)	34.9	33	−1.9	18,600	− 760	17,840	38	+ 3.1	18,200	+ 1,240	19,440	38	+3.1	18,700	+1,240
March (A)	44.3	45	+0.7	19,100	+ 280	19,380	55	+10.7	15,700	+ 4,280	19,980	47	+2.7	18,400	+1,080
April (A)	54.0	50	−4.0	13,700	−1,600	12,100	58	+ 4.0	11,500	+ 1,600	13,100	57	+3.0	10,300	+1,200
May	63.5	62	.....	9,700	.....	9,700	65	.....	8,600	.....	8,600	68	.....	7,800	.....
June (B)	72.3	71	.....	5,500	.....	5,500	76	.....	4,800	.....	4,800	75	.....	5,200	.....
July (B)	75.8	74	.....	4,500	.....	4,500	80	.....	4,000	.....	4,000	76	.....	4,500	.....
August (B)	74.6	72	.....	4,700	.....	4,700	75	.....	4,400	.....	4,400	75	.....	4,500	.....
September (B)	69.5	70	.....	5,200	.....	5,200	73	.....	4,700	.....	4,700	73	.....	4,900	.....
October	57.6	62	.....	7,700	.....	7,700	57	.....	9,900	.....	9,900	61	.....	8,800	.....
November (A)	45.1	43	−2.1	15,500	− 840	14,660	48	+ 2.9	14,100	+ 1,160	15,260	47	+ 1.9	12,600	+ 760
December (A)	35.3	36	+0.7	20,200	+ 280	20,480	39	+ 3.7	18,400	+ 1,480	19,880	39	+ 3.7	20,300	+1,480
Total				147,000	−4,280	142,720			134,200	+10,920	145,120			136,800	+5,320

Month	Mean temperature 1906 to 1926 inclusive (degrees)	1924 Temperature Actual	1924 Temperature Correction	1924 Consumption per consumer Actual (cu. ft.)	1924 Consumption per consumer Correction @ 400 cu. ft. per degree	1924 Consumption per consumer Corrected Total (cu. ft.)	1925 Temperature Actual	1925 Temperature Correction	1925 Consumption per consumer Actual (cu. ft.)	1925 Consumption per consumer Correction @ 400 cu. ft. per degree	1925 Consumption per consumer Corrected total (cu. ft.)	Consumption per Customer 1920 to 1925 inclusive Corrected Total (cu. ft.)	Annual Average (cu. ft.)
January (A)	34.1	30	−4.1	22,400	−1,640	20,760	33	− 1.1	21,500	− 440	21,060	127,260	21,210
February (A)	34.9	33	−1.9	19,900	− 760	19,140	43	+ 8.1	16,000	+ 3,240	19,240	114,540	19,090
March (A)	44.3	39	−5.3	19,800	−2,120	17,680	47	+ 2.7	15,200	+ 1,080	16,280	111,580	18,597
April (A)	54.0	55	+1.0	13,100	+ 400	13,500	59	+ 5.0	10,100	+ 2,000	12,100	76,700	12,783
May	63.5	58	.....	9,800	.....	9,800	60	.....	8,600	.....	8,600	53,700	8,950
June (B)	72.3	73	.....	5,700	.....	5,700	76	.....	5,100	.....	5,100	31,600	5,267
July (B)	75.8	73	.....	4,500	.....	4,500	75	.....	4,100	.....	4,100	26,000	4,333
August (B)	74.6	75	.....	4,200	.....	4,200	76	.....	4,000	.....	4,000	26,300	4,383
September (B)	69.5	64	.....	5,400	.....	5,400	76	.....	3,900	.....	3,900	29,400	4,900
October	57.6	62	.....	8,000	.....	8,000	50	.....	9,300	.....	9,300	52,900	8,817
November (A)	45.1	45	−0.1	11,700	− 40	11,660	43	− 2.1	14,000	− 840	13,160	82,860	13,810
December (A)	35.3	34	−1.3	19,300	− 520	18,780	32	− 3.2	18,600	− 1,320	17,280	119,380	19,897
Total				143,800	−4,680	139,120			130,400	+ 3,720	134,120	852,220	142,037

Note: (A) Winter Months
(B) Summer Months

Central Kentucky Natural Gas Company, Inc.

Consumption per Consumer, 1920 to 1925, Inclusive, Corrected According to Mean Monthly Temperature, with Gas Retailing at 40 cents per M. c. f.—Lexington District

mption sumer		1921					1922					1923				
		Temperature		Consumption per consumer			Temperature		Consumption per consumer			Temperature		Consumption per consumer		
ction cu. ft. egree	Corrected Total (cu. ft.)	Actual	Correction	Actual (cu. ft.)	Correction @ 400 cu. ft. per degree	Corrected total (cu. ft.)	Actual	Correction	Actual (cu. ft.)	Correction @ 400 cu. ft. per degree	Corrected Total (cu. ft.)	Actual	Correction	Actual (cu. ft.)	Correction @ 400 cu. ft. per degree	Corrected total (cu. ft.)
1,640	20,960	37°	+ 2.9°	19,900	+ 1,160	21,060	33°	−1.1°	20,800	− 440	20,360	39°	+ 4.9°	21,500	+ 1,960	23,460
760	17,840	38	+ 3.1	18,200	+ 1,240	19,440	38	+3.1	18,700	+1,240	19,940	32	− 2.9	20,100	− 1,160	18,940
280	19,380	55	+10.7	15,700	+ 4,280	19,980	47	+2.7	18,400	+1,080	19,480	43	− 1.3	19,300	− 520	18,780
1,600	12,100	58	+ 4.0	11,500	+ 1,600	13,100	57	+3.0	10,300	+1,200	11,500	53	− 1.0	14,800	− 400	14,400
.....	9,700	65	.....	8,600	.....	8,600	68	.....	7,800	.....	7,800	63	.....	9,200	.....	9,200
.....	5,500	76	.....	4,800	.....	4,800	75	.....	5,200	.....	5,200	74	.....	5,300	.....	5,300
.....	4,500	80	.....	4,000	.....	4,000	76	.....	4,500	.....	4,500	77	.....	4,400	.....	4,400
.....	4,700	75	.....	4,400	.....	4,400	75	.....	4,500	.....	4,500	74	.....	4,500	.....	4,500
.....	5,200	73	.....	4,700	.....	4,700	73	.....	4,900	.....	4,900	69	.....	5,300	.....	5,300
.....	7,700	57	.....	9,900	.....	9,900	61	.....	8,800	.....	8,800	56	.....	9,200	.....	9,200
840	14,660	48	+ 2.9	14,100	+ 1,160	15,260	47	+ 1.9	12,600	+ 760	13,360	45	− 0.1	14,800	− 40	14,760
280	20,480	39	+ 3.7	18,400	+ 1,480	19,880	39	+ 3.7	20,300	+1,480	21,780	45	+ 9.7	17,300	+ 3,880	21,180
4,280	142,720			134,200	+10,920	145,120			136,800	+5,320	142,120			145,700	+ 3,720	149,420

1925						Consumption per Customer 1920 to 1925 inclusive	
1,640	20,760	33	− 1.1	21,500	− 440	21,060	Corrected Total (cu. ft.) 127,260
760	19,140	43	+ 8.1	16,000	+ 3,240	19,240	114,540
2,120	17,680	47	+ 2.7	15,200	+ 1,080	16,280	111,580
400	13,500	59	+ 5.0	10,100	+ 2,000	12,100	76,700
.....	9,800	60	.....	8,600	.....	8,600	53,700
.....	5,700	76	.....	5,100	.....	5,100	31,600
.....	4,500	75	.....	4,100	.....	4,100	26,000
.....	4,200	76	.....	4,000	.....	4,000	26,300
.....	5,400	76	.....	3,900	.....	3,900	29,400
.....	8,000	50	.....	9,300	.....	9,300	52,900
40	11,660	43	− 2.1	14,000	− 840	13,160	82,860
520	18,780	32	− 3.3	18,600	−1,320	17,280	119,380
4,680	139,120			130,400	+ 3,720	134,120	852,220

Annual Average (cu. ft.)
21,210
19,090
18,597
12,783
8,950
5,267
4,333
4,383
4,900
8,817
13,810
19,897
142,037

[fol. 189-a-10]

Estimated Percentage Decrease in Gas Sales (Cubic Feet) per Consumer in the Lexington District Resulting from Increase in Retail Price of Gas from 40 Cents per M. c. f.

Month	Mean temperature 1906 to 1926 incl.	Average consumption per customer, 1920 to 1925, incl., based on mean temperature and gas selling at 40 cents per M. c. f. (cu. ft.)	1926 mean temperature	1906–1926 mean temperature variation from 1926 mean temperature	Consumption differential 400 cu. ft. per consumer per degree of temperature variation	Estimated average consumption per consumer based on 1926 temperature conditions and a rate of 40 cents per M. c. f. (cu. ft.)	Actual consumption per consumer in 1926 with a rate of 50 cents per M. c. f. (cu. ft.)	Per cent, decrease due to increase in rate from 40 cents to 50 cents per M. c. f.	1927 mean temperature	1906–1926 mean temperature variation from 1927 mean temperature	Consumption differential 400 cu. ft. per consumer per degree of temperature variation	Estimated average consumption per consumer based on 1927 temperature conditions at a rate of 40 cents per M. c. f. (cu. ft.)
January	34.1°	21,210	32.0°	+ 2.1°	+ 840	22,050	20,651	.....	33.4°	+ 0.7°	+ 280	21,4[illegible]
February	34.9	19,090	37.3	− 2.4	− 960	18,130	15,440	.....	43.4	− 8.5	− 3,400	15,6[illegible]
March	44.3	18,597	36.7	+ 7.6	+ 3,040	21,637	17,849	.....	47.8	− 3.5	− 1,400	17,1[illegible]
April	54.0	12,783	49.0	+ 5.0	+ 2,000	14,783	14,247	.....	55.4	− 1.4	− 560	12,2[illegible]
May	63.5	8,950	64.6	.....	.....	8,950	7,951	.....	63.4	.....	.....	8,9[illegible]
June	72.3	5,267	69.4	.....	.....	5,267	5,020	.....	68.8	.....	.....	5,2[illegible]
July	75.8	4,333	76.8	.....	.....	4,333	4,048	.....	75.2	.....	.....	4,3[illegible]
August	74.6	4,383	76.0	.....	.....	4,383	3,704	.....	69.2	.....	.....	4,3[illegible]
September	69.5	4,900	71.4	.....	.....	4,900	4,294	.....	72.2	.....	.....	4,9[illegible]
October	57.6	8,817	57.2	.....	.....	8,817	7,303	.....	61.0	.....	.....	8,8[illegible]
November	45.1	13,810	40.8	+ 4.3	+ 1,720	15,530	14,216	.....	49.7	− 4.6	− 1,840	11,9[illegible]
December	35.3	19,897	35.0	+ 0.3	+ 120	20,017	16,364	.....	35.0	+ 0.3	+ 120	20,0[illegible]
Total		142,037				148,797	131,087	11.9%				135,2[illegible]

Percentage Decrease in Gas Sales (Cubic Feet) per Consumer in the Lexington District Resulting from Increase in Retail Price of Gas from 40 Cents per M. c. f. to 50 cents per M. c. f.

1926 mean temperature	1906–1926 mean temperature variation from 1926 mean temperature	Consumption differential 400 cu. ft. per consumer per degree of temperature variation	Estimated average consumption per consumer based on 1926 temperature conditions and a rate of 40 cents per M. c. f. (cu. ft.)	Actual consumption per consumer in 1926 with a rate of 50 cents per M. c. f. (cu. ft.)	Per cent, decrease due to increase in rate from 40 cents to 50 cents per M. c. f.	1927 mean temperature	1906–1926 mean temperature variation from 1927 mean temperature	Consumption differential 400 cu. ft. per consumer per degree of temperature variation	Estimated average consumption per consumer based on 1927 temperature conditions and a rate of 40 cents per M. c. f. (cu. ft.)	Actual consumption per consumer in 1927 with a rate of 50 cents per M. c. f. (cu. ft.)	Per cent, decrease due to increase in rate from 40 cents to 50 cents per M. c. f.
32.0°	+ 2.1°	+ 840	22,050	20,651	.....	33.4°	+ 0.7°	+ 280	21,490	17,649	.....
37.3	− 2.4	− 960	18,130	15,440	.....	43.4	− 8.5	− 3,400	15,690	13,245	.....
36.7	+ 7.6	+ 3,040	21,637	17,849	.....	47.8	− 3.5	− 1,400	17,197	13,261	.....
49.0	+ 5.0	+ 2,000	14,783	14,247	.....	55.4	− 1.4	− 560	12,223	10,577	.....
64.6	.....	.....	8,950	7,951	.....	63.4	.....	.....	8,950	7,649	.....
69.4	.....	.....	5,267	5,020	.....	68.8	.....	.....	5,267	5,270	.....
76.8	.....	.....	4,333	4,048	.....	75.2	.....	.....	4,333	3,905	.....
76.0	.....	.....	4,383	3,704	.....	69.2	.....	.....	4,383	4,164	.....
71.4	.....	.....	4,900	4,294	.....	72.2	.....	.....	4,900	4,658	.....
57.2	.....	.....	8,817	7,303	.....	61.0	.....	.....	8,817	7,495	.....
40.8	+ 4.3	+ 1,720	15,530	14,216	.....	49.7	− 4.6	− 1,840	11,970	10,612	.....
35.0	+ 0.3	+ 120	20,017	16,364	.....	35.0	+ 0.3	+ 120	20,017	15,865	.....
			148,797	131,087	11.9%				135,237	114,349	15.4%

[fol. 189-a-11] Central Kentucky Natural Gas Company, Inc.

Estimated Gas Sales in Lexington District in Year 1927, Giving Effect to the Proposed Retail Rate and Mean Monthly Temperature of Years 1906 to 1926, Incl.

(This estimate is based on the actual number of consumers and gas sales for the year ended Dec. 31, 1927, but correcting the sales to reflect the mean temperatures)

Month	Total actual consumption 1927 (M. c. f.)	Actual number of consumers 1927 (A)	Actual consumption per consumer (cu. ft.)	Temperature			Corrected consumption per consumer based on 400/cu. ft. per degree of variation	Consumption	
				Mean 1906 to 1926 inclusive	Actual 1927	1927 variation from mean 1906 to 1926 temperature		Per consumer based on mean temperature 1906–1926 incl. (cu. ft.)	Total based on mean temperature 1906–1926 incl. (M. c. f.)
January (Winter month)	178,664	10,123	17,649	34.1	33.4	− 0.7	− 280	17,369	175,826
February "	134,174	10,130	13,245	34.9	43.4	+ 8.5	+ 6,400	16,645	168,614
March "	134,741	10,161	13,261	44.3	47.8	+ 3.5	+ 1,400	14,661	148,970
April "	107,516	10,165	10,577	54.0	55.4	+ 1.4	+ 560	11,137	113,208
May	77,790	10,171	7,648	63.5	63.4	.....	.....	7,648	77,790
June	53,697	10,188	5,270	72.3	68.8	.....	.....	5,270	53,697
July	39,834	10,201	3,905	75.8	75.2	.....	.....	3,905	39,834
August	42,701	10,256	4,164	74.6	69.4	.....	.....	4,164	42,701
September	48,246	10,357	4,658	69.5	72.2	.....	.....	4,658	48,246
October	78,498	10,474	7,495	57.6	61.0	.....	.....	7,495	78,498
November (Winter month)	111,718	10,527	10,612	45.1	49.7	+ 4.6	+ 1,840	12,452	131,082
December "	168,375	10,613	15,865	35.3	35.0	− 0.3	− 120	15,745	167,102
Total	1,175,954	123,366	114,349				+ 6,800	121,149	1,245,568

Estimated Decrease in Gas Sales (7.5%) due to increase of Retail Gas Rate from 50 cents per M. C. F. to minimum monthly charge of 60 cents including first 100 cu. ft.; 60 cents per M. c. f. for the next 4,900 cu. ft. and 50 cents per M. c. f. for all over 5,000 cu. ft. 93,418

Estimated Total Consumption Predicated on Increase of Retail Gas Rate and Mean Temperature of 1906 to 1926, incl. 1,152,150

Note.—(A) Meters carried on gas ledger at end of month.

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[fol. 189-a-12] Central Kentucky Natural Gas Company, Inc.

Estimated Gas Sales (M. c. f.) and Revenue from the Cities of Winchester and Mt. Sterling and from the wholesale consumers

(This estimate is based on the actual gas sales during the year ended December 31, 1927, but correcting the sales to reflect mean temperatures from 1906 to 1926, inclusive, and also correcting the sales to give effect to reduced consumption resulting from increased rate)

Retail Sales	Total actual sales year ended Dec. 31, 1927 (M. c. f.)	Correction (+6.0%) for mean temperature 1906 to 1926 incl. (M. c. f.)	Total actual sales year 1927 after correction for temperature (M. c. f.)	Correction (−7.5%) for proposed retail rate (M. c. f.)	Estimated total sales predicated on proposed retail rate and mean temperature 1906 to 1926 incl. (M. c. f.)	Proposed average rate per (M. c. f.)	Estimated revenue
Winchester	253,393	15,203	268,596	20,145	248,451	$0.60	$149,071
Mt. Sterling	147,577	8,855	156,432	11,732	144,700	.60	86,820
Total	400,970	24,058	425,028	31,877	393,151	.....	$235,891
Wholesale Sales							
Frankfort Ky. Natural Gas Co.	305,596	18,336	323,932	.....	323,932	.35(A)	113,376
Kentucky Utilities Co.	169,903	10,194	180,097	13,507	166,590	.45(B)	74,966
Blue Grass Natural Gas Co.	14,535	872	15,407	1,156	14,251	.45(C)	6,413
Total	490,034	29,402	519,436	14,663	504,773		194,755

Note.—(A) 35 cents per M. c. f. is Contract Sale Price to Frankfort Ky. Natural Gas Co. (70 per cent of Frankfort retail rate).

(B) Contract Price is 75 per cent of retail rate of City of Paris which retail rate at no time shall be considered for the purpose of determining this wholesale rate, less than in the City of Lexington.

(C) Contract price is 75 per cent of retail rate in towns supplied which retail rate at no time shall be considered for the purpose of determining this wholesale rate, less than the rate in the City of Lexington.

[fol. 189-a-13]

Central Kentucky Natural Gas Company, Inc.

Estimate of Revenue from Gasoline, Shop, Interest, and Miscellaneous

Source	Revenue years ended Dec. 31			Estimated revenue based on average of years 1924, 1925, and 1926		
	1924	1925	1926	Entire system	Basis of allocation	Lexington district (B)
Gasoline	$8,794	$7,724	$11,236	$9,251	Gas Sales	$5,220
Shop	6,356	2,378	6,091	4,942	No. of Meters	3,628
Interest	42	143(A)	1,481	555	Gas Sales	314
Miscellaneous	1,039	658	665	787	Gas Sales	444
Total	$16,231	$10,903	$19,473	$15,535	.....	$9,606

Note.—(A) Company's Books show $5,647; Ford, Bacon & Davis, Inc. deducted the Interest received from Hillsdale Gas Co., i.e. $5,504 which has been considered herein as non-operating revenue.

[fol. 189-a-14]

Central Kentucky Natural Gas Company, Inc.

Estimate of Field and Main-line Expenses, City Plant Expenses, and General Expenses

	Company's actual expenses, years ended Dec. 31			Estimated expense based on average year 1924, 1925, and 1926		
Field and Main Line Expense	1924	1925	1926	Entire system	Basis of allocation	Lexington district
General	$13,412	$14,089	$14,179			
Wells	3,145	6,050	7,762			
Lines	15,640	10,025	8,817			
Pumping Stations	20,068	20,112	18,053			
Total Field and Main Line Expense	$52,265	$50,276	$48,811	$50,450	Gas Sales $56.42 %	$28,464
City Plant Expense						
Lines	$9,971	$11,294	$9,187			
Shop	22,065	20,407	26,192			
Office	23,842	25,697	26,521			
Total City Plant Expense	$55,878	$57,398	$61,900	$61,841	Location (A)	$41,946
General Expense	35,752	43,845	32,401	37,333	Other Expenses and Consumers	21,839
Total	$143,895	$151,519	$143,112	$149,624	.....	$92,249

Note.—(A) The estimated City Plant expense i.e. $61,841 was obtained by multiplying the average number of consumers for the year 1927 by the average city plant expense per consumer for the years 1924, 1925 and 1926.

[fol. 189-a-15]

Central Kentucky Natural Gas Company, Inc.

Estimated Quantity and Cost of Gas Purchased

Name of company	Minimum quantity per contract (M. c. f.)	Estimated quantity of gas purchased (M. c. f.)	Contract price per M. c. f.	Estimated cost of gas purchased	Basis of contract price per M. c. f.
United Fuel Gas Co.	720,000	720,000	$0.30	$216,000	50 Per Cent of Average Domestic Rate
Petroleum Exploration Co., Inc.	750,000	750,000	.40	300,000	40 Cents per M. c. f. at Lexington City Gate
Hillsdale Gas Co.	720,000	450,000	.267	120,150	20 cents plus 1/3 of any increase over 40 cents per M. c. f.
Bed Rock Petroleum Co.	1,220,000	125,000	.18	22,500	30 per cent of Average Domestic Rate
Carroll Oil and Gas Co.	300,000	200,000	.10	20,000	10 cents per M. c. f.
Kentucky City Gas Co.	1,000,000	125,000	.225	28,125	17.5 Cents plus 25 per cent of increase over 40 cents per M. c. f.
Various Independent Producers		350,000	.10	35,000	10 cents per M. c. f.
Total Purchased Gas		2,720,000	$0.273	$741,775	
Red Bush Production		100,000			
Total Gas Purchased and Produced		2,820,000		$741,775	
Estimated Total Gas Sales		2,050,074			
Estimated Loss and Company Usage		205,007			
Total		2,255,081			
Gas Stored in Ground		564,919	$0.1213	$68,525	
Gas Purchased Account				$673,250	

[fol. 189-a-16]

Central Kentucky Natural Gas Co., Inc.

Estimate of Taxes for Entire System and Proportion Allocated to Lexington District

	Entire system	Basis of allocation	Lexington district
Franchise Taxes	$24,915(A)	Location	$14,620(A)
Tangible Property Taxes	12,390(A)	"	6,694(A)
Federal Income Tax	20,207	"	13,322
Total Taxes	$57,512		$34,636

Note.—(A) Average of Franchise and Tangible Property Taxes paid for the Years Ended Dec. 31, 1924, 1925, and 1926. See detail on following sheets.

[fol. 189-a-17]

Central Kentucky Natural Gas Company, Inc.

Estimate of Federal Income Tax, Franchise Tax, and Tangible Property Tax

	Entire system		Lexington district	
Gross Revenue		$1,137,851		$701,276
Less:				
Expenses—				
Field and Main Line	$50,450		$28,464	
City Plant	61,841		41,946	
General	37,333		21,839	
Gas Purchased	673,250	822,874	379,848	472,097
		$314,977		$229,179
Allowance of extraordinary Maintenance	33,474		21,262	
Rental Paid to Lexington Utilities Co., Inc.	79,520		79,520	
Other Taxes Paid	37,305(A)		21,314(A)	
Miscellaneous Deductions	15,000	165,299	8,400	130,496
Net Revenue		$149,678		$98,683
Federal Income Tax (13-½%)		20,207		$13,322

Note.—(A) Other Taxes Paid is an Average of the Years Ended Dec. 31, 1924 to 1926, inclusive

	Entire system			Lexington district		
Year	Franchise tax	Tangible property tax	Total	Franchise tax	Tangible property tax	Total
1924	$25,033	$9,158		$14,616	$4,812	
1925	28,426	13,395		16,737	7,320	
1926	21,286	14,616		12,507	7,949	
Average	$24,915	$12,390	$37,305	$14,620	$6,694	$21,314

[fol. 189-a-18]

Central Kentucky Natural Gas Co., Inc., Lexington Utilities Co., Inc.

Summary of Estimated Annual Allowance Necessary for Amortization, Depletion Extraordinary Maintenance and Contingencies

Estimated Annual Allowance Necessary for Amortization and Depletion	Entire system	Lexington, district
Central Kentucky Natural Gas Co., Inc.	$146,603	$82,477
Lexington Utilities Co., Inc.	12,191	12,191
Total	$158,794	$94,668
Estimated Annual Allowance Necessary for Extraordinary Maintenance		
Central Kentucky Natural Gas Co., Inc.	$25,090	$12,878
Lexington Utilities Co., Inc.	8,384	8,383
Total	$33,474	$21,262
Estimated Annual Allowance Necessary for Contingencies		
Central Kentucky Natural Gas Co., Inc.	$	$
Lexington Utilities Co., Inc.		
Total	$10,000	$5,600
Total Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	$202,268	$121,530

[fol. 190] The Witness: This sets forth what the Company may expect to do under the proposed rate of "60 cents minimum charge including first 100 Cu. Ft. per month; 6 cents per 100 Cu. Ft. for next 4,900 Cu. Ft. per month; and 50 cents per M. c. f. for all over 5,000 Cu. Ft. per month." Page 4 of this Exhibit summarizes all the figures contained [fol. 191] therein and shows an estimate of the net revenue available for the returns based on the proposed rate, that being the rate which has been filed with this Commission, as I understand it. This Exhibit shows the net revenue available for return in the entire system is $55,197, whereas for the Lexington District is $73,013. That may appear rather peculiar that they don't make as much on the entire property as they do in the Lexington District, but that results from the fact that they are selling wholesale gas at a loss; so, in allocating the revenues and expenses, in the allocation of the Lexington District, it takes out that loss and lets the Lexington District stand on its own feet.

* * * * * * *

To illustrate it as clearly as possible, the Frankfort, Kentucky, Natural Gas Company pays to the Central Kentucky Natural Gas Company 35¢ a thousand for gas at the Central Kentucky Natural Gas Company's Plant in Lexington; and the Central Kentucky Natural Gas Company in turn pays to the Petroleum Exploration Company 40¢ for gas delivered in Lexington.

* * * * * * *

Page 5 of Exhibit 6 is the supporting detail of the estimated revenue from gas sales; and for the entire system gross receipts are estimated at $1,122,316, sales being estimated to be 2,050,074 M. c. f. Of this amount 1,545,301 [fol. 192] M. c. f. are sold at retail, and 504,773 M. c. f. are sold at wholesale. The allocation then to the Lexington District is simply the first item on this statement, totaling $691,670, at the rate of 60¢, as will be shown in a few moments, is an average which results from the application of the proposed rate.

Page 6 is the detail supporting the estimate of $691,670 which appears on page 5, as being the revenue derived under the proposed rate in the Lexington District.

The first column on page 6 is merely a classification of the bills rendered monthly; for example, the first figure "0" means no gas; and the next figure "1" is bills for 1,000 cubic feet; and the next one is "2", bills for 2,000 cubic feet, etc.

In column 2 are the number of bills sent out by the Company during the year 1926 for each of the various amounts of gas shown in the first column. For example, 7,221 bills with no gas at all in the year 1926; 7,435 bills were submitted for 1,000 cubic feet, and 10,432 for 2,000 cubic feet, etc. The third column simply states the percentage of the bills in each of these classifications to the total; that is, 6.19% of the bills submitted in the year 1922 were for quantities of 1,000 cubic feet.

* * * * * * *

In the fourth column are the number of bills sent out during the year 1927. We know that there were 123,366 bills rendered in that year, but we didn't have the statistics

at the time this statement was filed from which we could determine the number which were sent out for the various [fol. 193] quantities of gas sold. Therefore we separated 123,366 for the year 1927 in the same proportion as applied in the year 1926; in other words, we applied the same percentages as shown in column 3 to the 123,366.

In column 5 is an estimate of the total sales of gas under the proposed rate, and the figure shown in the total 1,152,150 M. c. f. is my estimate of the amount of gas which will be sold in the Lexington District under this proposed rate, and I will show the derivation of that figure in a subsequent statement, but suffice for the moment to say that the 1,152,150 M. c. f. is correct. We will prorate that to the various classifications of consumers. In other words, of that amount of gas 7,638 M. c. f. will be sold to consumers talking 1,000 cubic feet per month; and 21,434 M. c. f. will be sold to consumers taking 2,000 cubic feet per month, and so on down the line to 1,010,711 M. c. f. that will be sold to the consumers taking in excess of 5,000 cubic feet per month.

The next columns 6 and 7, shows the amount of gas sold and the revenue derived under the minimum charge section of the rate which has been filed here, that charge being 60¢ which includes the first 100 cubic feet used by consumers during the month.

The consumers who take no gas at all, of which 7,418 are shown in column 4, are the estimated number in 1927 who would, under this proposed rate, pay to the Company 60¢, or a total of $4,451, under column 7. The consumers who take 1,000 cubic feet (namely, 7,638, shown in column 4, scond line) would pay to the Company a minimum charge [fol. 194] of 60¢ per month, or $4,583, and that payment would include 763.8 M. c. f. shown under column 6. That same computation is carried down so that near the bottom there would be, from consumers taking more than 5,000 cubic feet per month a revenue of $41,265, shown in column 7, which is the product of the 68,775 consumers in column 4, times 60¢; and those consumers would be given with that payment, without further charge, 6,877.5 M. c. f. which is the first 100 cubic feet that they burn; so that the total receipts under the minimum charge and based on the number of consumers taking gas in the year 1927 would be the total under column 7, or $74,020, and that would carry with

it, without further charge to the consumers, 11,594.8 M. c. f. during that year.

In the next two columns, Nos. 8 and 9, there is shown the gas sold and the revenue derived in the next step of this proposed rate, which is 6¢ per hundred for the next 900 cubic feet (6¢ per 100 cubic feet for the next 900 cubic feet). Under this classification, of course, the consumer who burns no gas at all gets no bill for any gas. The consumers who burn 1,000 cubic feet (namely 7,638, shown in column 4) would pay for 900 cubic feet of that gas at the rate of 6¢ per hundred, or 54¢, and that times 7,638 would result in the figure of $4,124, which includes this 6,874.2 M. c. f. during the year.

Similarly, the consumers who burn in excess of 5,000 cubic feet per month (68,775, shown in column 4) would pay for 900 cubic feet of that, which totals up 61,897.5 M. c. f., shown in column 8, at the rate of 6¢, which times that 61,897.5 is $37,139. That, under this step is the rate that the Company would receive from the sale of gas, the total shown in column 9, $62,612, which would include the [fol. 195] sale of 104,353.2 M. c. f.

The next step in the rate calls for the next 4,000 cubic feet at the rate of 60¢ per cubic thousand; in other words; all in excess of 1,000 and up to 5,000 is billed at the rate of 60¢ per thousand. Of course the consumer who burns less than a thousand is not in that classification, nor is the consumer who burns over 5,000 a month in that classification; but the consumer who burns 2,000 cubic feet in a month falls in that class in that he gets over his first 1,000 and must pay 60¢ for his second thousand. Taking for example the 10,717, consumers who burn 2,000, and that is set forth in column 4, they would take, under the third step in the rate, a total of 10,717 M. c. f., which is the product of 1,000 times the consumers in column 4, and for that gas they would pay at the rate of 60¢ per thousand, which would result in a total of $6,430, shown in column 11, for those consumers.

The same computation is shown for each of the other class of consumers, so that the total revenue to be derived as shown in the total of column 11 is $221,620, which includes the sale of 369,366 M. c. f. * * *

The last step in the rate is 50¢ for all gas sold or consumed in the month in excess of 5,000 cubic feet. There

are, as shown in column 4, 68,775 consumers who take in excess of 5,000 cubic feet. Multiply that number of consumers by 5,000 cubic feet, and deducting the resulting figure from the 1,010,711 M. c. f. shown in column 5, results in the figure 666,836 M. c. f., shown in column 12, and that is the amount of gas which the Company would sell and derive a revenue of 50¢ per 1,000 for, which is equal to [fol. 196] $333,418.

In column 14 is shown the sum of the receipts in the sale of gas under this proposed rate, and the figures in that column are the sum of the figures in columns 7, 9, 11 and 13, and adding up that series of figures results in $691,670, under the application of this proposed rate. That figure divided by the estimated sales shown in the total of column 5 (1,152,150 M. c. f.) results in an average in the application of this rate of 60¢ per thousand.

* * * * * * *

Well, the statement on page 7 shows, for the years 1920 to 1927 inclusive, the actual sales of gas in the Lexington District by months, the numbers of consumers at the end of each month and the consumption per consumer for each of those months and also the average temperatures in Lexington in each of those months. The first column shows the mean temperature from 1906 to 1926, so that the comparison can be shown of the average or mean temperature for any of those years. The rate during this period was 40¢ per thousand for all consumers, except in 1926, when they had to pay 50¢, and except in December, 1927, when it was increased to 60¢.

* * * * * * *

Page 8 is an estimate of the effect of temperature on the consumption of gas. Our conclusion, based on the increase [fol. 197] there, is that for every degree rise in temperature during the winter months, there is a decrease in the sale of gas quivalent to 400 cubic feet per month per consumer. That means the figure shown in the extreme lower right hand side of the statement, 395; I call it in round figures 400.

Statement on page 9 corrects the consumption of natural gas in each of those respective years to what it would be if

the temperature in those years had been average normal temperature; in other words, it eliminates the temperature factor.

Statement number 10 shows what the effect has been on the sale of gas through the increase from 40¢ per thousand to 50¢ per thousand, and in the 8th column the conclusion is that when the price of gas was increased from 40¢ to 50¢, it resulted in 1926 in a decrease of 11.9% in the sale of gas per consumer. Similarly in 1927 a decrease in the sale of gas is shown at the extreme right of the table, through the increase in the rate was 15.4%. As the price of a commodity increases, you don't sell as much of the commodity; people conserve it, and that must be taken into consideration. Naturally if the decreased consumption more than offset the increase in rate, it would be to the Company's disadvantage to increase the rate, but that hardly prevails, as the sales do not drop off as rapidly as the rate goes up.

* * * * * * *

On page 11 is shown my estimate of the amount of gas which would be sold under this rate, and that is figured on the lower right hand corner of that sheet (1,152,150 M. c. f.), which would be sold in the Lexington District under the proposed schedule, and that is the figure which I referred [fol. 198] to in discussing page 6 under column 5, under that statement.

Page 12 is an estimate of the revenue from the sale of gas in Winchester and Mt. Sterling and to the wholesale consumers, corrected, as giving effect to the temperature conditions and to the decrease in sales resulting from the increase in rate.

Page 13 is an estimate of the revenue from gasoline, shop and miscellaneous sources, and that estimate is based solely on an average of the three years, 1924-1926 inclusive, as what it will probably continue to be.

Page 14 is an estimate of expenses under the proposed rate and is the average for the years 1924-1926, inclusive, except in the instance of the city plant expenses, which gives effect to the increasing number of consumers, the city plant expense being the average number of consumers for 1927 multiplied by the average city plant expense per consumer for the years 1924, 1925 and 1926.

The statement on page 15 is an estimate of the cost of gas under the proposed rate; and this statement will answer, I believe, Mr. Chairman, what the Company will pay under this proposed rate.

Statement number 16 is an estimate of the taxes which would apply.

Statement number 17 is the total underlying estimate of Federal Income Tax and the Franchise and Tangible Property Tax.

Statement number 18 is the estimate of the annual allowance necessary for amortization, depletion, extraordinary maintenance and contingencies; and that statement has been fully explained in my discussion of Company Exhibit No. 4, page 28 hereof.

* * * * * * *

Mr. Duncan: In your judgment, what represents a fair [fol. 199] rate of return on the invested capital of a natural gas utility, assuming that, with the proper rate, it will produce that return?

The Witness: In my opinion, it should not be less than 10% on a natural gas utility.

Mr. Duncan: Why is that?

The Witness: On other utilities, which are continuing in operation, seven percent or eight percent is considered a reasonable return by courts and commissions. The natural gas business, however, is a more hazardous enterprise, and the man who will put his money in there is entitled to a higher rate of compensation than the man that puts it in an electric utility or some similar one, which is not subject to the same hazard.

Hearing April 26, 1928

* * * * * * *

The Witness: At the last hearing we presented an Exhibit No. 4, which showed the earnings and expenses for the years 1922-1926, inclusive, and at that time I believe it was stated that we would supplement that Exhibit with one showing the earnings and expenses for the year 1927, and I have prepared such an Exhibit to be filed at this time.

[fol. 199-a] [File endorsement omitted]

COMPANY EXHIBIT No. 8

[fol. 199-b] Net Revenue Avaliable for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., Based on Operating Reports of the Central Kentucky Natural Gas Company, Inc., for the Year 1927

April 17, 1928

Ford, Bacon & Davis, Incorporated, Engineers, New York, Philadelphia, Chicago, San Francisco, New Orleans

[fol. 199-a-1] Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., Based on Operating Reports of the Central Kentucky Natural Gas Company, Inc., for the Year Ended December 31, 1927

April 17, 1928

The following statements show the revenue of the Central Kentucky Natural Gas Company, Inc. available for return on the combined property of the Central Kentucky Natural Gas Company, Inc. and the Lexington Utilities Company, Inc. for the year ended December 31, 1927, together with supporting figures. The Central Kentucky Natural Gas Company, Inc. leases the property of the Lexington Utilities Company, Inc.—which consists of the distribution system inside the corporate limits of the City of Lexington—and operates this distribution system as a part of the Central Kentucky Natural Gas Company's system. In the following statements, the rental paid to the Lexington Company by the Central Company, (12.5 per cent of the gross earnings in Lexington less $1,250 per year) has been excluded from the expenses of the latter.

The term, "Lexington District" as used in the various statements, includes the suburbs of the City as well as the City proper.

[fol. 199-a-2] In 1927, excepting the month of December, when a rate of 60 per M. c. f. was put into effect, the Central Kentucky Natural Gas Company, Inc. retailed gas at 50 cents per M c. f. Ten cents of both the 50 cent and 60 cent rates were impounded pending settlement of rate controversy.

The Company has prepared two annual reports, one of which shows what the Company actually did receive, that is the amount which was impounded was not included, and the other shows what the Company would have earned if it had been permitted to retain all of the receipts. Gas Purchase contracts, in a number of instances, fix the price of gas sold to the Central Kentucky Natural Gas Co. Inc., as a function of the retail selling price of gas sold by the Central Company, and therefore a change in the retail selling price of gas affects the expenses as well as the revenue.

The income and expenses for the year 1927, for the Entire System and the proportion allocated to the Lexington District, are shown in the following statements, based on including and excluding the 10 cents per M. c. f. which was impounded.

The pages following show:

(a) Net Revenue Available for Return.

(b) Summary of Revenue and Expenses.

(c) Details of Gross Revenue.

(d) Details of Expenses and Gas Purchased.

(e) Summary of Estimated Annual Allowance necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies.

[fol. 199-a-3] Unless stated otherwise, the gas sales (M. c. f.) and the revenue and expenses tabulated on the following statements were taken from the books and/or reports of the Central Kentucky Natural Gas Company, Inc.

[fol. 199-a-4]

Net Revenue of Central Kentucky Natural Gas Co., Inc., Available for Return on Property of Central Kentucky Natural Gas Co., Inc., and Lexington Utilities Co., Inc., for the Year 1927, with Retail Gas Sales at 40 Cents per M. c. f. for First Eleven Months and 50 Cents per M. c. f. for Last Month

	Entire system	Lexington district
Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$228,471	$145,345
Deduct: Estimated Annual Allowance necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	202,268	121,530
Net Revenue Available for Return	$26,203	$23,815
Per Cent Return based on the Estimated Cost of Reproduction New Less Observed Deterioration as of December 31, 1927	0.59%	0.85%

[fol. 199-a-5]

Net Revenue of Central Kentucky Natural Gas Co., Inc., Available for Return on Property of Central Kentucky Natural Gas Co., Inc., and Lexington Utilities Co., Inc., for the Year 1927, with Retail Gas Sales at 50 Cents per M. c. f. for First Eleven Months and 60 Cents per M. c. f. for Last Month

	Entire system	Lexington district
Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$321,045	$219,837
Deduct: Estimated Annual Allowance necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	202,268	121,530
Net Revenue Available for Return	$118,777	$98,307
Per Cent Return based on the Estimated Cost of Reproduction New Less Observed Deterioration as of December 31, 1927	2.69%	3.52%

[fol. 199-a-6] Revenue and Expense Statement for Entire System and Proportion Allocated to Lexington District, Year Ended December 31, 1927

	Entire system		Lexington District	
	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Gross Revenue from Operation:				
Gas Sales:				
Lexington—Urban and Suburban	$489,068	$606,615	$489,068	$606,615
Winchester and Mt. Sterling	164,911	203,390	.....	.....
Wholesale sales	164,315	176,278	.....	.....
Miscellaneous Gas Sales	525	525	297	297
Total Gas Sales	$818,819	$986,808	$489,365	$606,912
Gasoline	8,499	8,499	4,802	4,802
Shop	901	901	509	509
Interest	427	427	241	241
Miscellaneous	691	691	390	390
Total Gross Revenue	$829,337	$99[illegible]	$495,307	$612,854
Operating Expenses:				
Field and Main Line Expense	58,449	58,449	33,024	33,024
City Plant Expense	67,357	67,357	47,681	47,681
General Expense	27,922	27,922	16,596	16,596
Gas Purchased	404,090	477,350	228,311	269,703
Total Operating Expense	$557,818	$631,078	$325,612	$367,004
Net Revenue before Taxes	271,519	366,248	169,695	245,850
Taxes	43,048	45,203	24,350	26,013
Net Operating Revenue, Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	$228,471	$321,045	$145,345	$219,837

[fol. 199-a-7] Allocation of Gross Revenue of the Entire System to the Lexington District, Year Ended December 31, 1927

	Entire system			Lexington District	
	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month	Basis of allocation	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Gross Revenue from Operations:					
Gas Sales:					
Lexington—Urban	$453,612.68	$562,626.87	Location	$453,612.68	$562,626.87
" —Surburban	35,455.62	43,987.94	"	35,455.62	43,987.94
Total Lexington District	$489,068.30	$606,614.81		$489,068.30	$606,614.81
Winchester	104,670.62	129,897.71			
Mt. Sterling	60,240.31	73,491.94			
Total Retail Sales	$653,979.23	$810,004.46		$489,068.30	$606,614.81
Wholesale Sales:					
Frankfort Ky. Natural Gas Co	$106,958.60	$106,958.60			
Kentucky Utilities Co	52,839.98	63,713.61			
Blue Grass Natural Gas Co	4,516.50	5,606.61			
Total Wholesale Sales	$164,315.08	$176,278.82		.....	.....
Miscellaneous Gas Sales	525.00	525.00	Gas Sales	296.63	296.63
Total Gas Sales	$818,819.31	$986,808.28		$489,364.93	$606,911.44
Gasoline	8,499.41	8,499.41	Gas Sales	4,802.17	4,802.17
Shop	901.05	901.05	"	509.09	509.09
Interest	427.19	427.19	"	241.36	241.36
Miscellaneous	690.83	690.83	"	390.32	390.32
Total Gross Revenue	$829,337.79	$997,326.76		$495,307.87	$612,854.38

[fol. 199-a-8] Retail and Wholesale Gas Sales for the Year 1927, Showing Quantity, Average Rate per M. c. f., and Revenue

	At 40 cents per M. c. f. for first eleven mo. and 50 cents for last month			At 50 cents per M. c. f. for first eleven mo. and 60 cents for last month		
	M. c. f.	Amount	Rate	M. c. f.	Amount	Rate
Retail Sales:						
Lexington—Urban	1,090,631.5	$453,612.68	$0.4159	1,090,631.5	$562,626.87	$0.5159
" —Suburban	85,323.2	35,455.62	.4155	85,323.2	43,987.94	.5155
Total Lexington District	1,175,954.7	$489,068.30	$0.4159	1,175,954.7	$606,614.81	$0.5158
Winchester	253,393	$104,670.62	$.4131	253,393	$129,897.71	$.5126
Mt. Sterling	147,577	60,240.31	.4082	147,577	73,491.94	.4980
Total Retail Sales	1,576,924.7	$653,979.23	$0.4147	1,576,924.7	$810,004.46	$0.5137
Wholesale Sales:						
Frankfort Ky. Natural Gas Co	305,596	$106,958.60	$.3500	305,596	$106,958.60	$.3500
Kentucky Utilities Co	169,903	52,839.98	.3110	169,903	63,713.61	.3750
Blue Grass Natural Gas Co	14,535	4,516.50	.3107	14,535	5,606.61	.3857
Total Wholesale Sales	490,034	$164,315.08	$0.3353	490,034	$176,278.82	$0.3597
Miscellaneous Gas Sales	3,500	525.00	.1500	3,500	525.00	.1500
Total Gas Sales	2,070,458.7	$818,819.31	$0.3955	2,070,458.7	$986,808.28	$0.4766

[fol. 199-a-9]

Calculation of Percentages used in the Allocation of Revenue, Expenses and Taxes to Lexington District based on Company's Gas Sales
(Average of Years 1923 to 1927, inclusive)

	1923	1924	1925	1926	1927	1923 to 1927, incl. Total	1923 to 1927, incl. Average	Percentage Used in Allocation
Retail Sales—M. c. f.:								
Lexington—Urban	1,178,656	1,235,613	1,166,131	1,218,312	1,090,631	5,889,343	1,177,869	.....
Lexington—Suburban	62,426	89,500	108,887	85,590	85,323	431,726	86,345	.....
Total Lexington District	1,241,082	1,325,113	1,275,018	1,303,902	1,175,954	6,321,069	1,264,214	56.50%
Winchester	285,787	304,017	277,585	295,304	253,393	1,416,186	283,237	12.66
Mt. Sterling	164,003	173,056	161,849	177,926	147,577	826,411	165,282	7.39
Total Retail Sales	1,690,872	1,802,186	1,716,552	1,777,132	1,576,924	8,563,666	1,712,733	.....
Wholesale Sales—M. c. f.:								
Frankfort Ky. Natural Gas Co.	321,829	339,933	317,067	331,847	305,596	1,616,272	323,254	.....
Kentucky Utilities Co	174,537	210,642	187,373	189,145	169,903	931,600	186,320	.....
Blue Grass Natural Gas Co.	15,690	15,793	14,750	14,185	14,535	74,953	14,991	.....
Total Wholesale Sales	512,056	566,368	519,190	535,177	490,034	2,622,825	524,565	23.45
Total Gas Sales	2,202,928	2,368,554	2,235,742	2,312,309	2,066,958	11,186,491	2,237,298	100.00%

[fol. 199-a-10] Operating Expenses

The pages immediately following show in detail the operating expenses, namely, the Field and Main Line, the City Plant and General Expenses of the Central Kentucky Natural Gas Co., Inc. for the year ended December 31, 1927 as reported by the Company and as adjusted by Ford, Bacon & Davis, Inc.

The Field and Main Line Expenses of the Entire System are allocated to the Lexington District on the ratio of gas sales in that district to the total gas sales of the Company. This ratio is 56.5 per cent as shown on a preceding page.

The City Plant Expense required no allocation as the actual expenses of the Lexington District are taken from the Company's records.

Items of General Expense are allocated on various bases shown on the detailed statement.

Gas production and purchases are taken from the Company's records, with minor adjustments as shown on the detail sheet following. The gas purchased account is allocated to the Lexington District on the basis of gas sales, that is 56.5 per cent.

Field and Main Line Expense—Entire System and proportion Allocated to Lexington District; also Reconciliation of Company's Expenses with those used by Ford, Bacon & Davis, Inc., for Year Ended December 31, 1927

Classification	Entire System		Basis of allocation	Lexington District	
	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month		At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
General:					
Damages	$101.28	$101.28			
Cost of Obtaining Leases, Paying Rentals, etc	939.83	939.83			
Rentals, Land	191.52	191.52			
Royalties, Well	7,352.50	7,352.50			
Salaries and Expenses of Field Supt. and Foremen	8,052.37	8,052.37			
Telephone and Telegraph Repairs	1,023.19	1,023.19			
Tools and supplies	163.88	163.88			
Total	$17,824.57	$17,824.57			
Wells:					
Operating Wells	1,797.68	1,797.68			
Repairs—Labor, Teaming and Freight	2,217.81	2,217.81			
Repairs—Material	223.67	223.67			
Total	$4,239.16	$4,239.16			
Lines:					
Changing Construction	439.33	439.33			
Operating Lines	5,775.01	5,775.01			
Repairs—Labor, Teaming and Freight	1,799.63	1,799.63			
Repairs—Material	367.37	367.37			
Measuring Stations	2,404.50	2,404.50			
Total	$10,785.84	$10,785.84			
Pump Stations:					

Operating—Labor, Teaming and Freight	9,989.16	9,989.16			
Operating—Material	2,461.31	2,461.31			
Repairs—Labor, Teaming and Freight	3,633.35	3,633.35			
Repairs—Material	9,515.27	9,515.27			
Total	$25,599.09	$25,599.09			
Total Field and Main Line Expenses used by Ford, Bacon & Davis, Inc.	$58,448.66	$58,448.66	Gas Sales	$33,023.49	$33,023.49
Add:					
Taxes (A)	9.75	9.75			
Cost of Gas Used as Fuel (B)	4,696.70	4,696.70			
Total Additions	$4,706.45	$4,706.45			
Total Field and Main Line Expenses per Company's Reports	$63,155.11	$63,155.11			

NOTE.—(A) Taxes are shown as a separate item on attached statement and therefore deducted from expenses.
(B) Cost of Gas used in Compressing Stations is debited to Expense and credited to revenue on the Company's Books; Ford, Bacon & Davis, Inc., exclude it from both.

[fol. 199-a-12]

City Plant Expense, Entire System and Lexington District; also Reconciliation of Company's Expenses with Those Used by F. B. & D., Inc. for Year Ended December 31, 1927

Lines: Classification	Entire System		Lexington District (B)	
	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Changing Construction	$550.37	$550.37	$69.25	$69.25
Main to Curb	780.39	780.39	396.21	396.21
Operating Lines	263.99	263.99	−1,924.43	−1,924.43
Repairs—Labor, Teaming and Freight	7,159.47	7,159.47	6,628.05	6,628.05
Repairs—Material	4,334.24	4,334.24	4,335.44	4,335.44
Total	$13,088.46	$13,088.46	$9,504.52	$9,504.52
Shop				
Connecting, Disconnecting and Reading Meters	$10,050.00	$10,050.00	$7,105.56	$7,105.56
General Labor	6,966.74	6,966.74	5,031.04	5,031.04
Repairs of Meters	5,573.13	5,573.13	4,155.81	4,155.81
Tools and Supplies	1,653.31	1,653.31	1,297.38	1,297.38
Total	$24,243.18	$24,243.18	$17,589.79	$17,589.79
Office:				
Miscellaneous	$834.58	$834.58	$756.12	$756.12
Rent, Heat, Light, etc	4,966.50	4,966.50	3,381.46	3,381.46
Salaries—Agents and Clerks	20,175.70	20,175.70	13,443.23	13,443.23
Stationery and Supplies	4,048.45	4,048.45	3,006.30	3,006.30
Total	$30,025.23	$30,025.23	$20,587.11	$20,587.11
Total City Plant Expenses Used by F. B. & D. Inc	$67,356.87	$67,356.87	$47,681.42	$47,681.42
Add:				
Plant Rental Expense (A)	55,451.59	69,049.51	55,451.59	69,049.51
Total City Plant Expenses per Company's Reports	$122,808.46	$136,406.38	$103,133.01	$116,730.93

NOTE.—(A) This item is the rental for the use of the Distribution System Property of the Lexington Utilities Co. Inc., located in the City of Lexington. Ford, Bacon & Davis, Inc. treated this property as though it were a part of the Central Co. System and therefore deducted the rental from Expense.

(B) These Expenses are as reported by the Company and are not the result of allocation.

[fol. 199-a-13]

General Expense, Entire System, and Proportion Allocated to the Lexington District; also Reconciliation of Company's Expenses with Those Used by F. B. & D., Inc., for Year Ended December 31, 1927

Classification	Entire system: At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	Entire system: At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month	Basis of allocation	Lexington District: At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	Lexington District: At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Salaries and Expenses, Officers and Superintendents	$10,171.63	$10,171.63	Ratio of other expenses	$5,930.06	$5,930.06
General Office (Salaries, Rents, Stationery, etc.)	13,113.19	13,113.19	" " " "	7,644.99	7,644.99
Private Telephone and Telegraph Lines (Operating and Maintaining)	135.97	135.97	Gas sales	76.82	76.82
Repairs to Buildings	3,662.45	3,662.45	Ratio of other expenses	2,135.21	2,135.21
Miscellaneous	318.97	318.97	Location	284.15	284.15
Interest on Meter Deposits	548.59	548.59	Location	553.33	553.33
Bad Gas and Shop Accounts	−28.40	−28.40	Location	−28.40	−28.40
Unclaimed Meter Deposits					
Total General Expense as used by F. B. & D. Inc.)	27,992.40	$27,922.40		$16,596.16	$16,596.16

	Entire system	
	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Adjustments:		
Add:		
Interest and Exchange (A)	$18,236.57	18,236.57
Taxes (B)	35,412.31	35,412.31
Rate Case Expense, etc. (C)	11,752.61	11,752.61
Total Additions	$65,401.49	$65,401.49
Deduct (Company charged these items to Profit and Loss):		
Bad Gas and Shop Accounts	548.59	548.59
Unclaimed Meter Deposits	−28.40	−28.40
Total Deductions	$520.19	520.19
Net Additions	$64,881.30	$64,881.30
Total General Expense per Company's Reports	$92,803.70	$92,803.70

Calculation of Percentage Relation of Other Expenses for the Lexington District to the Entire System.

Expense	Entire System	Lexington District
Field and Main Line	$58,448.66	$33,023.49
Gas Purchased	404,090.17	228,310.96
City Plant	67,356.87	47,681.42
Total 1927	$529,896.70	$309,015.86
Percentage Relation	100%	58.3%

NOTE.—(A) Interest on unfunded debt, etc., are not included by Ford, Bacon & Davis, Inc., as an item of expense, since the object is to show return on property.

(B) Taxes are shown as a separate item on attached statement and therefore excluded from expenses.

(C) Ford, Bacon & Davis, Inc., estimated an allowance for these items in the cost of obtaining Franchises.

Gas Production and Purchases Year Ended December 31, 1927

	At 40 cents per M. c. f. for first 11 mo. and 30 cents for the last month			At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month		
	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.
Gas Purchases:						
Bed Rock Petroleum Company	132.442	$16.136.37	$0.122	132.442	$20.109.63	$0.152
Hillsdale Gas Company	195.337	39.067.40	.20	195.337	45.578.62	.233
Kentucky Cities Gas Company	75.674	13.360.59	.177	75.674	15.252.43	.202
Petroleum Exploration Co., Inc	87.726	13.217.85	.151	87.726	15.410.99	.176
United Fuel Gas Company	1.182.431	241.696.20	.204	1.182.431	300.817.75	.254
Boston & So. Western Oil and Gas Company	59.765	5.976.50	.10	59.765	5.976.50	.10
Carroll Oil & Gas Company	211.365	22.508.55	.106	211.365	22.508.55	.106
East Kentucky Oil Company	19.896	1.989.60	.10	19.896	1.989.60	.10
Eastern Kentucky Oil Company	17.423	1.742.30	.10	17.423	1.742.30	.10
Fearless Oil & Gas Company	12.188	1.218.80	.10	12.188	1.218.80	.10
George & Tauma	20.698	2.069.80	.10	20.698	2.069.80	.10
J. T. Hare & Son	9.116	911.60	.10	9.116	911.60	.10
Alamander Kelly	45.889	4.588.90	.10	45.889	4.588.90	.10
Martin Oil & Gas Company	30.965	3.096.50	.10	30.965	3.096.50	.10
McNabb & Chennront	19.451	1.945.10	.10	19.451	1.945.10	.10
Portsmouth O. K. Gas Company	18.619	1.861.90	.10	18.619	1.861.90	.10
Pu-John Oil Company	54.699	5.469.90	.10	54.699	5.557.62	.102
Lewis Vincent	12.972	2.594.40	.20	12.972	2.594.40	.20
Inland Gas Corp	264.195	54.677.57	.207	264.195	63.384.06	.24
Petroleum Exploration, Inc. (Owsley)	118.713	47.485.34	.40	118.713	47.485.34	.40
Total Gas Purchased	2.589.564	$481.615.17	$0.186	2.589.564	$564.096.38	$0.218
Less Amount Stored in Menifee Field	742.451	93.464.35	.126	742.451	102.685.54	.138
Net Available Purchased Gas	1.847.113	$388.150.82	$0.210	1.847.113	$461.410.84	$0.250

	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month			At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month		
	M. c. f.	Amount	Per M. c. f.	M. c. f.	Amount	Per M. c. f.
Production:						
Withdrawn from Menifee Field	153,020	16,674.94	.109	153,020	16,674.94	.109
Produced from Red Bush Field	203,395	.....	.....	203,395	.....	.....
Total Production	356,415	$16,674.94	.....	356,415	$16,674.94	.....
Total Gas Available for Sale and Use as per Company's Books	2,203,528	$404,825.76	$0.184	2,203,528	$478,085.78	$0.217
Adjustments:						
Add: Withdrawn from Menifee Field for Use in Menifee Compressor Station	4,790	445.47	.093	4,790	445.47	.093
Deduct: Amount of Adjustment in Cost of Gas Withdrawn from Menifee Field based on Corrected Cost per M. c. f. of Gas Stored	.....	1,181.06	.....	.....	1,181.06	.....
Net Adjustments	4,790	$-735.59	.....	4,790	$-735.59	.....
Total Gas Available for Sale and Use as Adjusted	2,208,318	$404,090.17	$0.183	2,208,318	$477,350.19	$0.216

[fol. 199-a-15]

Federal Income Tax, Franchise Tax, and Tangible Property Tax

	Entire system		Lexington District	
	At 40 cents per M. c. f. for first 11 mo. and 60 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month	At 40 cents per M. c. f. for first 11 mo. and 50 cents for the last month	At 50 cents per M. c. f. for first 11 mo. and 60 cents for the last month
Franchise Tax (A)	$24,915	$24,915	$14,620	$14,620
Tangible Property Tax (A)	12,390	12,390	6,694	6,694
Federal Income Tax	5,743 (B)	7,898 (C)	3,036 (C)	4,699 (C)
Total Taxes	$43,048	$45,203	$24,350	$26,013

NOTE.—(A) Franchise and Tangible Property Taxes for the year 1927 are estimated as an average of the years 1924, 1925 and 1926.

(B) Actual Federal Tax, for the year 1927 per Company's records.

(C) Estimated on relation of net revenue.

[fol. 199-a-16]

Summary of Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance, and Contingencies

	Entire system	Lexington District
Estimated Annual Allowance Necessary for Amortization and Depletion:		
Central Kentucky Natural Gas Co., Inc	$146,603	$82,477
Lexington Utilities Co., Inc	12,191	12,191
Total	$158,794	$94,668
Estimated Annual Allowance Necessary for Extraordinary Maintenance:		
Central Kentucky Natural Gas Co., Inc	$25,090	12,878
Lexington Utilities Co., Inc	8,384	8,384
Total	$33,474	$21,262
Estimated Annual Allowance Necessary for Contingencies:		
Central Kentucky Natural Gas Co., Inc	$	$
Lexington Utilities Co., Inc		
Total	$10,000	$5,600
Total Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	$202,268	$121,530

NOTE.—A detail estimate of the above allowances is shown in Company's Exhibit No. 4.

[fol. 200] The Witness: This Exhibit No. 8 is entitled "Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., based on operating Reports of the Central Kentucky Natural Gas Company, Inc., for the year 1927." The Exhibit is dated April 17, 1928.

The statements contained therein are exactly parallel to and prepared in the same way that the corresponding statements have been prepared and are set forth in Exhibit No.

4, except that this one is for the year 1927. If you will refer to page No. 4 in Exhibit No. 8 you will find a summary statement, which shows the net revenue of the Central Kentucky Natural Gas Company available for return on the property of both the Central Kentucky Natural Gas Company and the Lexington Utilities Company, and based on the price of gas being 40¢ for the first eleven months of the year 1927, and 50¢ for the last month, those being the amounts which the Company obtained, though the receipts in each of those periods were 10¢ in excess of that; that 10¢ per M. c. f. was impounded.

This statement on page 4 shows that the net revenue available for return under the conditions just stated was, [fol. 201] for the entire system, $26,203; and allocated to the Lexington District, $23,815. Those amounts are 59/100 of 1% and 85/100 of 1% of the valuation of the property respectively.

On page 5 there is a similar statement based on the gas sales being at the rate of 50¢ per M. c. f. for the first eleven months, and 60¢ per M. c. f. for the last month.

Here you will note that the net revenue available for return, if the Company—that is, the Central Kentucky Natural Gas Company had been permitted to receive the full amounts of 50¢ and 60¢ in the period when those rates applied, the net revenue would have been $118,777; that is, for the entire system; and $98,307 allocated to the Lexington District. These amounts are 2.69% of the valuation of the property of the entire system and 3.52% of the valuation of the property allocated to the Lexington District.

Page 6 shows the total of gross revenue and operating expenses for the entire system and for the Lexington District, and in each instance for the entire system and for the Lexington District it is shown at the two rates, namely, 40¢ for the first eleven months and 50¢ for the last month, in one instance, and 50¢ in the other instance for the first eleven months and 60¢ for the last month in the last instance. Then at the bottom of that page you will note under the heading, "Net Operating Revenue Available for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends", are the amounts carried forward from the statements on pages 4 and 5.

[fol. 202] Page 7 is a detail of the gross revenue from operations and shows the amount received from the sale of

gas in Lexington, urban and suburban, in Winchester and Mt. Sterling, and from sales of gas to the three companies to which the Central Kentucky Natural Gas Company sells gas wholesale. It also shows the miscellaneous earnings from gasoline, shop, interest and miscellaneous, and these amounts have, in turn been allocated to the Lexington District in accordance with the basis shown in the center of that sheet. These amounts are carried forward from the statement on page 6.

Page 8 is a further detail of the sale of gas, showing the amount of gas sold in thousands of cubic feet, as well as the amount of money received from the sale of that gas, and the statement also shows the amount per thousand cubic feet which was received on the average.

Page 9 shows the sales of gas in thousands of cubic feet in each year from 1923 to 1927, inclusive, broken down by districts in which the sales were made; and it shows the average for that five year period; and in the last column the percentage which was sold in the various districts; that is, the percentage which was used in allocating the various expenses. And, in looking at the total gas sales on this sheet on the bottom, you will note that there has been not so great variation in those sales over that five year period. 1927, however, is less than ~~in~~ any of the previous years shown. That has resulted, I believe, from two causes, namely, that 1927 was a somewhat warmer year than the average, and secondly, that with the higher rate the sales are not as great as with the lesser rate.

[fol. 203] Page 11 shows the detail of one of the elements of operating expense, namely, Field and Main Line Expense; and it also shows the amount allocated to the Lexington District. You will note near the bottom of the sheet, "Total Field and Main Line Expenses used by Ford, Bacon & Davis, Inc." $58,448,66. The books showed, however, $63,155.11, the figure at the bottom of the sheet. Ford, Bacon & Davis have deducted from the book figure the tax of $9.75, which Ford, Bacon & Davis have included elsewhere; and they have also deducted the cost of gas used as fuel in the compressing stations, which the Company has included in its expense as well as in its revenue, $4,696.70, so that the one off-sets the other; so that we have neglected to consider it in either place, with the same net result.

Page 12 is the total of the City plant expense. That is the operation of the distribution system in Lexington, Winchester and Mt. Sterling, and it shows the summation of all those expenses for those three localities, as well as the amount applicable to the Lexington District. Here again, the third line from the bottom, you will find the total City plant expenses used by Ford, Bacon & Davis for the entire system, estimated at $67,356.87. The Company's books showed $122,808.46, the difference being due to the rental of $55,451.59, which was paid by the Central Kentucky Natural Gas Company to the Lexington Utilities Company for the use of the latter Company's distribution system inside of the corporate limits of the City of Lexington; and, as I have explained heretofore, we have included the valuation of these properties as set forth in Exhibit No. 1, on [fol. 204] which the Company is entitled to a return, and in that event we naturally could not include also the rental paid to that Company in its expenses.

Page 13 is the detail of the general expenses, and near the top of the sheet is the item of "Total General Expense as Used by Ford, Bacon & Davis, Inc.", and at the bottom of the sheet is shown the total general expense as reported by the Company. Ford, Bacon & Davis made these adjustments as shown under that caption and have deducted from the Company's report interest and exchange, because we are attempting to find out the amount available for that purpose, and consequently should not include that as an expense. We further deducted the taxes in this case, since we have included it in one lump sum elsewhere; we have deducted the rate case expenses, on the theory that that should be set up and written down year by year over the period of the franchise.

We have added, however, to the general expenses the loss which the Company experienced through bad gas and shop accounts and other miscellaneous items of unclaimed meter deposits which the Company has put under profit and loss rather than under property accounts.

Page 14 is the detail of gas production and purchases for the year ending December 31, 1927; and it shows what the Company would have paid for gas based on the rate of 40¢ for the first eleven months and 50¢ for the last month, in one instance, and what the Company would have paid

at 50¢ for the first eleven months and 60¢ for the last month, in the other instance.

I believe it is already in the record that many of these [fol. 205] gas transactions are worded so that the price which the seller receives for his product when he sells to the Central Kentucky Natural Gas Company is controlled by the price which the Central Kentucky Natural Gas Company gets for the gas that it sells at retail to its consumer. This statement shows all of the Companies or individuals from whom the Central Kentucky Natural Gas Company bought gas in the year ending December 31, 1927, and the amount in thousands of cubic feet as well as in dollars. It shows the amount, about the center of the sheet, that was stored in the Menifee Field during that time. It shows the amount which was withdrawn in the cold months of that year and the amount which was produced in the Company's own field, known as the Red Bush Field; and it shows the amount of adjustment, at the bottom, for gas which was used in the compressor stations; and also an adjustment for gas withdrawn from the Menifee Field, based on a corrected figure that Ford, Bacon & Davis have used and which differs slightly from that used by the Company.

Page 15 is a statement of the Federal Income Tax, Franchise Tax and Tangible Property Tax. The Franchise tax for the year 1927 is estimated as being the average for the years 1924, 1925, and 1926, the details of those taxes being set forth in Exhibit No. 4. The Company did not, as I understand it, actually pay much, if any, of the Franchise tax in 1927, though they are obligated to do so sooner or later.

The Tangible Property tax is likewise averaged for the years 1924, 1925 and 1926.

The Federal tax, $5,743 is the amount which the Company actually paid in 1928 on its income during the year 1927; and with a rate of 50¢ for the first eleven months and 60¢ for the last month, if the Company had been permitted to have all of the money which was impounded, then its Income Tax would have been $7,898 instead of $5,743 actually paid.

Page 16 is a summary of the estimated annual allowance necessary for amortization, depletion, extraordinary maintenance and contingencies; and that has been described in detail by description of Exhibit 4 where all the detail underlying all those figures is set forth.

[fols. 205-a-205-a-3] [File endorsement omitted]

Company Exhibit No. 9

[fol. 205-a-4 & 205-a-5 & 206] Statement No. 4

Central Kentucky Natural Gas Company, Inc.

Estimated Quantity and Cost of Gas Purchased, Based on Rate Structure of:
(a) $.75 Customer Charge.
(b) .65 per M. c. f. for first 5,000 cu. ft. per month.
(c) .60 per M. c. f. for next 5,000 cu. ft. per month.
(d) .55 per M. c. f. all over 10,000 cu. ft. per month.

Name of company	Minimum quantity per contract (M. c. f.)	Estimated quantity of gas purchased (M. c. f.)	Contract price per M. c. f.	Estimated cost of gas purchased
United Fuel Gas Co	720,000	720,000	35.0¢	$252,000
Petroleum Exploration Co. Inc.	750,000	750,000	40.0	300,000
Hillsdale Gas Co	720,000	450,000	30.0	135,000
Bed Rock Petroleum Co	1,220,000	125,000	21.0	26,250
Carrol Oil & Gas Co	300,000	200,000	10.0	20,000
Kentucky City Gas Co	1,000,000	125,000	25.0	31,250
Independent Producers		350,000	10.0	35,000
Total Purchased Gas		2,720,000		$799,500
Red Bush Production		100,000		
Total Gas Purchased and Produced		2,820,000		$799,500
Estimated Total Gas Sales		1,910,117		
Estimated Loss and Company Usage (10%)		191,012		
Total		2,101,129		
Gas Stored in Ground, Gas Purchased Account		718,871	13.0¢	$93,453
				$706,047

	Total estimated gas sales M. c. f.
Retail Sales:	
Lexington District	1,058,733
Winchester	228,307
Mt. Sterling	132,967
Total	1,420,007
Wholesale:	
Frankfort	323,932
Kentucky Utilities	153,082
Blue Grass	13,096
Total	490,110
Total Retail and Wholesale	1,910,117

[fol. 207] Hearing Held April 26 (Continued)

At the conclusion of the testimony of the witness, Kimball, at this hearing, the following letter was read into the record:

April 12th, 1928.

"Mr. Henry T. Duncan, Lexington, Ky.; Mr. D. L. Hazelrigg, Frankfort, Kentucky.

GENTLEMEN: This letter is addressed to you as attorneys for the Central Kentucky Natural Gas Company in the proceeding before the Railroad Commission of Kentucky, wherein City of Lexington, et al.—are Complainants, and the Central Kentucky Natural Gas Company is defendant.

On March 14 and 15, 1928, your client introduced before the Commission certain witnesses and among others Mr. John T. Kimball. This witness bases his testimony about the cost of gas to your client, upon certain contracts set out by name upon page 14 of Exhibit 4, filed on that occasion. But there were filed no copies of these contracts.

There were filed no copies of the contracts, one or more, between your client and the Lexington Utilities Company covering the use of the Lexington Distribution System.

There were filed no copies of the contracts, one or more between your client and the Petroleum Exploration, covering the gas supply to your client from the Owsley County [fol. 208] fields of the Petroleum Exploration.

This letter is to state to you that we desire to have filed in the record upon your next taking, copies of each and all of these contracts, and of each and every alteration and modification thereof. They should be put into the record by a witness who can testify to their accuracy and completeness.

We desire as well to have put into the record at that time the following information:

No. 1. Whether or not your client is now substantially owned by the Columbia Gas and Electric Company?

No. 2. Whether or not the Columbia Gas and Electric Company substantially owns the Ohio Fuel Supply Company?

No. 3. Whether or not the Columbia Gas and Electric Company and the Ohio Fuel Supply Company substantially owns the United Fuel Gas Company, named on page 14 of Exhibit 4, as one of the sellers to your client of gas?

No. 4. Whether or not any of the Companies from which your client is buying gas sell to your client gas which they are purchasing from other companies or individuals? And if so, the details as to quantities, prices, vendors and copies of contracts under which such purchases are made?

No. 5. Does the Columbia Gas and Electric Company own, in whole or in part, any of the Companies from which your client is buying gas, or from which your client's vendors are buying gas that is sold to your client? And if so, the extent of each instance?

No. 6. Is there any interrelation of stockholdings between the Columbia Gas and Electric Company and any [fol. 209] of these companies? And if so, the details thereof?

No. 7. Is there any interrelation, and if so, what is its extent, of stockhodings or ownership between the Columbia Gas and Electric Company, or any subsidiary of it, and the Petroleum Exploration and the Lexington Utilities Company, or either of them?

No. 8. What is the relation between the Columbia Gas and Electric Company, and the Hope Natural Gas Company; and is the last-named Company the owner of any gas now being utilized by your client?

N. 9. Is your client obtaining gas, directly or indirectly, from any source or sources other than those enumerated on page 14 of Exhibit 4? If it be, please give the name, and amounts and file copies of the contract under which such other purchases are being made.

These facts, as well, should be put into the record by a witness qualified to testify to their accuracy.

In the Columbia Gas and Electric Company's magazine "Hail, Columbia" issue of March, 1928, on page 20, appears this statement:

"The Central Kentucky Natural Gas Company officially became a part of Columbia's interconnected system on January 1, 1928."

This fact explains our queries above with respect to the Columbia Gas and Electric Company, and its interconnection with your client and the latter's sources of supply.

We shall need this testimony before we are enabled to present your evidence to our experts for analysis, and to proceed with our cross-examination.

[fol. 210] Very Respectfully, (Sgd.) Robt. H. Winn,
(Sgd.) D. C. Hunter, Attorneys for Complainants.

cc. Railroad Commission of Kentucky, Frankfort, Kentucky."

* * * * * * *

COLLOQUY

Judge Winn: I would like to ask Mr. Hazelrigg at this point as to what is the correct and proper name of the present Columbia Company?

Mr. Hazelrigg: Columbia Gas and Electric Corporation.

Judge Winn: I should like to ask as well that the enquiries in this letter of April 12, 1928, addressed to him and Mr. Duncan, may be read as if the enquiries addressed themselves to the Columbia Gas and Electric Corporation.

Mr. Hazelrigg: I will comply with Judge Winn's request.

Going back to No. 1, in view of having straightened out the matter of the correct name of the Company, the Columbia Gas and Electric Corporation owns a majority of the capital stock of the Central Kentucky Natural Gas Company.

As to query No. 2, the Ohio Fuel Supply Company has been dissolved. For the present, that is the answer to that enquiry.

Going back to query No. 3, and substituting the Columbia Gas and Electric Corporation for the Columbia Gas [fol. 211] and Electric Company, it is stated that the Columbia Gas and Electric Corporation owns 100% of the stock of the United Fuel Gas Company.

Coming to query No. 4, it is stated that the Central Company purchases gas from the United Fuel. A copy of that contract has been filed and the details of the quantities, prices, etc., have been given in testimony in this hearing.

As to the other companies from which the Central Company purchases gas, there is no relationship of any kind, no corporate relationship.

In answer to query No. 5, the Columbia Gas and Electric Corporation has no interest in any company from which the Central Company purchases gas, with the exception of the United Fuel Company and that interest is as above explained.

With reference to query No. 6, there is no interrelation between the Columbia Gas and Electric Corporation in any of the companies from which the Central Company purchases gas, with the exception of the United Fuel Gas Company.

With reference to query No. 7, the answer is, there is no interrelation.

Judge Winn: You mean as to either of these companies?

Mr. Hazelrigg: That is right.

With reference to enquiry No. 8, the answer is the same, that there is no interrelation between the Columbia Cor-
[fol. 212] poration and the Hope Natural Gas Company; nor is the Hope Natural Gas Company the owner of any gas now being utilized by the Central Company, so far as we know.

With reference to enquiry No. 9, at the present time the Central Company is not purchasing gas of any company other than those named in Exhibit No. 8, and filed by Mr. Kimball in today's hearing.

* * * * * * *

[fol. 213] The plaintiff then filed copies of the gas purchase contracts between the plaintiff and various companies and individuals as Exhibits Nos. 10 to 20, both inclusive, and Nos. 22 to 25, both inclusive. The material provisions of said contracts are abstracted as follows:

Co. Exhibit	Date	Name	Duration	Minimum annual delivery M. c. f.	Price
#10	12/31/23	South Western Oil & Gas	As long as gas produced in paying quantities	All produced	10 cents
#11	6/23/23	Boston & South Western O. & G. Co.	Ditto	Ditto	10 cents
#12	7/28/23	East Ry. Oil Co	Ditto	Ditto	10 cents
#13	2/25/24	Alamander Kelley	Ditto	Ditto	10 cents
#14	7/24/23	Martin Oil & Gas	Ditto	Ditto	10 cents
#15	2/—/25	H. T. Hare & Son	Ditto	Ditto	10 cents
#16	4/20/25	Lewis Vincent	Ditto	Ditto	20 cents
#17	9/25/22	Pu-John Oil Co	Ditto	Ditto	20% Domestic Rate
#18	7/20/20	Ky. Cities Gas Co	Ditto	1.000.000	17.5 cents plus 25% of increase over 40 cents per M. c. f.
#19	11/27/18	Menifee Oil & Gas	Ditto	Ditto	9½ cents
#20	11/ 1/12	United Fuel Gas Co	20 years	720.000	50 per cent of Average Domestic Rate
#22	3/24/27	Petroleum Exploration	2 20 47	750.000	40 cents per M. c. f. at Lexington City Gate
#23	11/21/27	Carroll Oil & Gas	10 years	300.000	15 cents
#24	1/24/27	Hillsdale Gas Co	10 years	720.000	20 cents plus 1/3 of any increase over 40 cents per M. c. f.
#25	11/20/18	Bed Rock Oil Co	As long as gas produced	1.220.000	30 per cent of Average Domestic Rate

[fol. 214] Following is a complete copy of

COMPANY EXHIBIT No. 22

This agreement, made and entered into this 24th day of March, A. D. 1927, by and between Petroleum Exploration, Incorporated, a corporation organized under the laws of the State of Maine, hereinafter called the "Petroleum Company", party of the first part and the Central Kentucky Natural Gas Company, Incorporated, a Kentucky Corporation, hereinafter called the "Central Company", party of the second part,

Witnesseth: Whereas the Petroleum Company is engaged inter alia in the business of producing natural gas from fields in Owsley and Clay Counties in the State of Kentucky and the Central Company is engaged inter alia in the business of distributing natural gas in the City of Lexington and vicinity in the State of Kentucky, and desires to supplement its present supply by purchasing natural gas from the Petroleum Company;

Now, therefore, for and in consideration of the mutual agreements herein contained to be paid, kept and performed, the parties hereto have agreed and do hereby agree with each other as follows:

First. The Petroleum Company agrees to construct a pipe line of not less than eight (8") inches inside diameter from its said Owsley County and Clay County gas fields to the measuring and regulating station next hereinafter mentioned; the construction of said pipe line to be commenced by said Petroleum Company not later than the 20th day of May, 1927, and carried on with due diligence, except as hereinafter otherwise provided, and said pipe line to be [fol. 215] completed in any event not later than the 20th day of May, 1928.

Second. The Central Company agrees to construct and equip a measuring and regulating station on East Third Street, at the said City of Lexington adjacent or near to its present high pressure regulating station there located; the construction and equipment of said measuring and regulating station shall be completed by the time the said pipe line is completed. The said regulating and measuring

station shall be equipped inter alia with orifice meters or such other measuring devices as the parties hereto may agree upon in substitution therefor. All equipment installed in said station shall be first approved by the Petroleum Company. The Petroleum Company shall pay to the Central Company one-half (½) of the actual cost of constructing and equipping said station, and shall own a one-half (½) interest therein, except the land on which said station is located, which land shall be furnished during the term of this agreement by the Central Company, without cost to the Petroleum Company. The said station shall be maintained and operated under the joint supervision and control of the parties hereto, each of said parties to furnish its own agents for the purpose, and the cost and expense of such maintainance and operation, except for salaries of such agents shall be shared equally by the said parties. Each of said parties shall at all times have free and uninterrupted access to said station.

Third. The Petroleum Company agrees to sell and deliver to the Central Company, provided it can furnish so [fol. 216] much from its said gas fields or from such other sources as may be connected to its said pipe line, and said Central Company agrees to purchase and accept from said Petroleum Company, at said regulating and measuring station, from and after the completion of said pipe line, at the price of forty (40¢) cents per thousand (1,000) cubic feet in each month during the term of this agreement minimum quantities of natural gas as follows:

In each	January	120,000,000	cubic feet
" "	February	90,000,000	" "
" "	March	80,000,000	" "
" "	April	60,000,000	" "
" "	May	45,000,000	" "
" "	June	30,000,000	" "
" "	July	30,000,000	" "
" "	August	30,000,000	" "
" "	September	30,000,000	" "
" "	October	50,000,000	" "
" "	November	75,000,000	" "
" "	December	110,000,000	" "

In addition thereto and subject to the same provisions and at the same price the Central Company shall have the option of purchasing from said Petroleum Company at said regulating and measuring station additional quantities of gas not to exceed in any one month one-third (⅓) of the amount above set forth opposite such month.

The delivery of said gas to the Central Company as above provided and set forth shall have priority over all other deliveries of gas from said pipe line.

Subject to said priority of the Central Company the Petroleum Company shall have the right to make deliveries of gas from said pipe line for distribution in the Towns and Cities of Pryse, Irvine, Ravenna, Richmond, and adjacent vicinities, in the State of Kentucky; and the Petro- [fol. 217] leum Company shall not make delivery of gas from said pipe line to any other Company, except for distribution as above mentioned, nor shall it make delivery of gas from said pipe line for distribution in any other town, city or vicinity unless it shall first offer such gas to the Central Company for distribution in such other town, city or vicinity and the Central Company shall have failed for the period of two (2) months to accept such offer.

If in any month gas in excess of the quantities above mentioned be delivered by the Petroleum Company and received by the Central Company at said regulating and measuring station such excess shall be paid for by the Central Company to the Petroleum Company at the same price, that is, forty (40¢) cents per thousand (1,000) cubic feet.

Gas delivered from said pipe line to the Central Company hereunder shall be made and accepted in daily amounts throughout each month as nearly uniform as practicable.

Fourth. If the Petroleum Company is unable to deliver the aggregate amount of gas as set forth in the above schedule of minimum monthly amounts during any winter period, namely from November 1 to April 30, inclusive, then the Central Company may at its election reduce the minimum amounts to be taken during the ensuing summer period, namely from May 1 to October 31, inclusive, in like proportion.

Fifth. If orifice or other recording meters are used the pressure charts shall be lifted daily in the presence of an

agent of each party hereto and shall be signed and certified by such agents and delivered forthwith to the Petroleum Company. The quantities of gas delivered hereunder shall be computed on the basis of six (6) ounces per square inch pressure above atmospheric, according to Boyle's law for [fol. 218] the measurement of gas at varying pressures. Fourteen and four tenths (14.4) pounds per square inch is adopted as atmospheric pressure and fifty (50 deg.) degrees Fahrenheit as temperature of such gas for the purpose of such computation. Gravity tests shall be made, according to the method prescribed by the United States Bureau of Standards, of samples of gas taken at said regulating and measuring station, semi-monthly, that is on or about the 1st and 15th days of each month, for the purpose of determining the future corrections in the coefficients of the orifice meters.

Sixth. The Petroleum Company shall on or before the 10th day of each month render to the Central Company a statement of account for the preceding month and payment of all amounts owed hereunder by the Central Company to the Petroleum Company for each month shall be made on or before the 20th day of the following month. The said pressure charts showing deliveries of gas in each month shall accompany the said statement for such month; the said charts shall be returned to the said Petroleum Company within thirty (30) days.

Seventh. When the rock pressure of the gas wells in said gas fields and of such other gas wells as may be connected to said pipe line is insufficient to maintain in said pipe line at said regulating and measuring station an adequate pressure, but not to exceed, however, fifty (50) pounds per square inch, then the Petroleum Company agrees without delay to install a compressor or compressors of sufficient capacity to enable it to maintain in said pipe line at said regulating and measuring station an adequate pressure, but not to exceed, however, fifty (50) pounds per square inch, so far as practicable in view of the quantities of gas supplied by such wells.

Eighth. The Petroleum Company reserves the right to [fol. 219] recover the gasoline from all gas before delivery thereof to the Central Company.

Ninth. In case the supply of gas available for delivery hereunder to the Central Company so diminishes that the Petroleum Company is unable to deliver five hundred thousand (500,000) cubic feet on the average per day during the winter period, namely, from November 1, to April 30, inclusive, either Company shall have the right upon six (6) months' written notice to cancel this agreement.

Tenth. It is mutually understood and agreed that where either party to this contract fails to perform any obligation herein assumed by it and such failure is due to acts of God, or a public enemy, strikes, riots, injunctions or other interferences through legal proceedings, breakage or accident to machinery or lines of pipe, washouts, earthquakes, storms, freezing of the lines or wells, sudden partial or entire failure of gas wells, or to any cause not due to the fault or neglect of such party, or is caused by the necessity of making repairs or alterations in machinery or lines of pipe, such failure shall not be deemed to be a violation by such party of its obligations hereunder, but such party shall use due diligence to again put itself in position to carry out all of the obligations which by the terms hereof it has assumed.

Eleventh. Unless previously terminated pursuant to the provisions hereof or by mutual consent of the parties hereto, this agreement shall be in force until and shall terminate on the 20th day of February, 1947, at which time the Central Company shall have the option to purchase from the Petroleum Company, by giving it written notice within ten (10) days, its one-half (½) interest in the said [fol. 220] regulating and measuring station, and the portion of said pipe line at and between Lexington and Ida May, Kentucky, and all compressing stations, equipment and machinery, at and between said places used in connection with the operation of said pipe line, at such price as may be mutually agreed upon between the parties hereto but in the event they are unable to so agree, then at such price as shall be fixed by three (3) disinterested persons, one to be selected by the Petroleum Company, one by the Central Company, and the third by the two so chosen.

Twelfth. It is mutually understood and agreed that in case the Central Company shall fail to pay the Petroleum

Company any amount that may be due and payable hereunder to the Petroleum Company within thirty (30) days after such amount becomes due and payable, the Petroleum Company shall have the right, without canceling this agreement or waiving any of its rights hereunder, to suspend the delivery of natural gas hereunder until all amounts due it are paid, or at its option shall have the right to terminate this agreement on thirty (30) days' notice to the Central Company, without prejudice to its right to collect the amounts due it at the time of such termination for any gas furnished hereunder, and to recover such damages as it may sustain by breach of this agreement by the Central Company.

Thirteenth. This agreement shall be binding upon and extend to the parties hereto and their successors and assigns, respectively.

In witness whereof the parties hereto have hereunto [fol. 221] caused their corporate names to be signed by their respective Presidents and their respective seals to be hereunto affixed by their respective Secretaries the day and year first above written.

Petroleum Exploration (Incorporated), by Ed Durham, President. Attest: L. E. Gregg, Secretary. Central Kentucky Natural Gas Co. (Incorporated), by John Tonkin, President. Attest: Robert S. Hampton, Secretary.

WJB:MFS.

[fol. 222] Hearing May 18, 1928

W. J. Hightower, Assistant Treasurer and Assistant Secreary of Gas Company, testified in substance:

That he had custody of the books and records of said Company; that he had examined Exhibit No. 4 filed by Mr. J. T. Kimball showing net revenue available for return, and that all of the figures therein contained purporting to be taken from the books of the Company were correct as they appear upon said books.

T. J. TOMKIN, JR., Vice-President and Operating Manager of the Gas Company, testified in substance as follows:

That he had been employed by the Gas Company and intimately associated with the business of said Company since 1905; that in 1905 the Gas Company purchased from the New Domain Oil and Gas Company, the gas field in Menifee County, Kentucky, and developed this field, which was its only source of supply until 1912, in which year the Gas Company made a contract with the United Fuel Gas Company for the delivery of gas at Inez, Martin County, Kentucky, and in order to receive this gas the Company extended its ten-inch main transmission line from the Menifee field to Inez, Kentucky.

That of the date the witness testified there were three main sources of supply, to-wit: United Fuel Gas Company, Petroleum Exploration, Inc., Inland Gas Corporation, and in addition thereto, the Company's own field in Menifee County.

That the other sources of supply were from various independent producers, but were of a minor character.

[fol. 223] That the gas was then being withdrawn or used from the Menifee Field mainly for the purpose of meeting peak demands in very cold weather.

That during the winter of 1927-1928 gas was withdrawn from the Menifee field during a portion or all of thirty-three days.

That the gas obtained from the Petroleum Exploration was first turned into the Company's pipe lines in November, 1927.

That the first five days in January, 1928, the temperature was down to about zero, and during that period it was necessary to withdraw gas from the Menifee Field from 8 o'clock A. M., on January 1st, until 8 o'clock P. M., on January 5th—during which time there was withdrawn and put into the Company's lines, about twenty-two million cubic feet of gas.

That during said period from January 1 to January 5, inclusive, the Company was using all of the gas it could obtain from all of its other sources of supply.

That on January 1, 1928, the Company distributed and sold about 19,152,000 cubic feet of gas, which was obtained from the following sources, to wit:

Petroleum Exploration	5,307,000 cu. ft.
United Fuel Gas Company	3,673,000 cu. ft.
Inland Gas Corporation	1,672,000 cu. ft.
All other producers	500,000 cu. ft.
Menifee Field	500,000 cu. ft.
The Company's Red Bush Field and various smaller producers in the same field	3,000,000 cu. ft.

and that on said date the Company was taking all of the gas which each of said producers was able to deliver.

That Petroleum Exploration, under its contract, agreed to maintain at Lexington, a pressure of fifty pounds, and [fol. 224] the company agreed to purchase during the month of January of each year, 120,000,000 cubic feet of gas,—an average of 4,000,000 cubic feet per day; that by taking on January 1, 1928, 5,307,000 cubic feet, the excess load placed upon the Petroleum Exploration, pulled down their pressure to 20 pounds, which was just as low as it could be and have proper service at Lexington.

That prior to the making of the contract with the Petroleum Exploration, the company had not been able to supply peak demands during very cold weather, and such inability had been the cause of many complaints; and the winter of 1927-1928 was the first time in many years that the company had been able to approximate perfect service, and this was by reason of having obtained the additional supply from the Owsley County field (Petroleum Exploration) through the separate pipe line from Lexington to Owsley County.

Hearing March 11-12, 1929

Witnesses for the City

[fol. 225] JOHN JIRGAL testified that he was a Public Accountant and member of the firm of Arthur Andersen & Company, Public Accountants of Chicago, Illinois, and that he was experienced in public accounting work and in making valuations of public utility properties.

He testified that he had determined from the books of the Central Kentucky Natural Gas Company, used and useful

in rendering gas service, and from the books of Lexington Utilities Company, the book cost of said combined properties as adjusted by him as of December 31, 1927, to be $2,101,719.34, and that the net additions to the property of Central Kentucky Natural Gas Company during the year 1927, amounted to $81,987.32, and the net addition to the property of Lexington Utilities Company during the year 1927, amounted to $53,604.73, a total of $135,592.05.

EARL L. CARTER, a qualified consulting engineer and specializing in public utility valuation work, testified that he had made an appraisal of the physical property of the Central Kentucky Natural Gas Company and of the Lexington Utilities Company (being the distribution plant in the City of Lexington), based on reproduction cost new and as depreciated by him as of December 31, 1926 and also as of December 31, 1927, the difference in said two values as depreciated by him being $53,452.00.

He presented and filed certain Exhibits designated respectively as "Carter Exhibit No. 7," "Carter Exhibit No. 8," and "Carter Exhibit No. 10," copies of which are filed herewith as part hereof.

The following portion of Mr. Carter's testimony concerning said Exhibits is reproduced in the form of questions and answers in the exact words of said witness as follows:

[fol. 226] "Counsel: Mr. Carter, you were asked to make up as a matter of computation for the Commission two certain Exhibits, No. 7 and No. 8, which I asked you to file under those numbers and as to which I desire to go into something of detail with you, No. 7 being "Rate of Return for Lexington District Using Various Values for Property of the Central Kentucky Natural Gas Co., Inc., and Considering Rental Paid to the Lexington Utilities Co., Inc.," and for No. 8 this title, "Rate of Return for Lexington District Using Various Values for Property for Central Kentucky Natural Gas Co., Inc., and the Lexington Utilities Co., Inc., and Considering the Property of the Lexington Utilities Co., Inc., as a Part of the Integer."

Will you now file those two Exhibits with the Commission and supply copies to interested counsel?

The Witness: Yes sir.

Same are attached hereto marked "Carter No. 7" and "Carter No. 8."

[fol. 227] Counsel: "Mr. Carter, referring now to Exhibit No. 7, you were asked by Counsel for the City of Lexington as a matter of computation for the benefit of Counsel and the Commission to bring down certain definite results of cost of gas to the City of Lexington and its consumers and what would be an appropriate price, and as toward that end you were asked to make these calculations upon two separate hypotheses—first to consider the property of the Central Kentucky Natural Gas Company as one integer and the properties of the Lexington Utilities Company leased by them to the Central Kentucky Natural Gas Company as a separate integer under the rental conditions as called for on the contract exhibit on file in the record; in the other computation you were asked to treat as the Central Kentucky Natural Gas Company expert has treated the matter, the property of the Central Kentucky Natural Gas Company and the Lexington Utilities Company as an entire integer, disregarding the rental lease, but carrying it into the rate base. Have you made that up on this theory?

The Witness: "I have; yes sir.

Counsel: "Now, on Exhibit No. 7 we find at the top the word "Assuming" and under that the letters "A-G". "A" says: "Various values for property of Lexington district of Central Kentucky Natural Gas Co., Inc." Are they those values that appear in Roman Numerals, items of [fol. 228] I, II, III, IV and V below?

The Witness: Yes, sir; they are.

Counsel: And "B" says: "1926 operating expenses and revenue". Where did you get the operating expenses and revenues that you have utilized in making this calculation?

The Witness: From Exhibit No. 4, filed by Ford, Bacon & Davis, Inc.

Counsel: In other words, you have adopted for the purpose of this calculation Messrs Ford, Bacon & Davis' manifestation of expenses?

The Witness: That is right, for the year 1926.

Counsel: "C" says: "750,000,000 cu. ft. of gas purchased at 40¢/M cu. ft." Do you understand why you were asked to make a calculation upon that basis?

The Witness: I think I do; yes, sir.

231. Why?

A. The 750,000,000 cu. ft. represent the minimum amount annually under the Petroleum Exploration Company contract that the Central Kentucky Natural Gas Company would be obligated to take at 40¢ per M. cu. ft.

Counsel: In other words, you find in the record a contract obligation upon the part of the Central Kentucky Natural Gas Company to buy from the Petroleum Explora[fol. 229] tion Company as much as 750,000,000 cu. ft. a year.

The Witness: That is correct.

Counsel: And you have figured that at 40¢, the contract price?

The Witness: Yes, sir."

* * * * * * *

Counsel: "Now, turn to Exhibit 8. You were asked in this Exhibit, differing from that of No. 7, only to treat the two items of values, those of the Central Kentucky Company allocated to Lexington, and those of the Lexington Utilities Company used in the distribution at Lexington as one entire property.

The Witness: That is correct.

250. And then to make these same calculations.

A. Yes, sir.

251. Is that correct?

A. It is.

252. And upon the assumption of the purchase of 750,000,000 cu. ft. of gas at 40¢ M. cu. ft.?

A. Yes, sir."

Hearing April 8-16, 1929

"Mr. Carter, upon your former examination in chief you were asked to make up two Exhibits which you filed as "Carter No. 7." and "Carter No. 8", wherein you manifested what the rate of return would be to the Gas Com[fol. 230] pany under the sale price of 40¢ a thousand cubic feet after the purchase by the Gas Company of 750,000 M cubic feet at 40¢, the balance at 12½¢ and allocated to the Lexington District; and to thus differentiate your two calculations, you were asked to put in one based on the property of the Lexington Utilities Co., and the Central Kentucky Natural Gas Co., as separate integers, and in the

ather to treat the two as has done Mr. Kimball of the Gas Co.—as an integer; and in response to that request you made up and filed these Exhibits No. 7 and No. 8.

Since then we have asked you to compile upon the same hypothesis an Exhibit which I will ask you to file as Exhibit "Carter No. 10", assuming the selling price of gas by the Central Kentucky Natural Gas Co., to be 60¢ instead of 40¢. Have you made up and prepared such a document.

The Witness: I have.

Counsel: Will you file the original thereof with the Commission, marking the same "Carter No. 10", supplying copies to Counsel for the Gas Company and the Intervenors.

The Witness: I will; yes, sir."

* * * * * * *

Cross examination:

Q. You are familiar with this franchise contract, are you not?

A. In a general way.

Q. You know, don't you, that under the terms of the contract this Company was required to go out and make ar- [fols. 231 & 231 a] rangements to purchase gas or get gas from another independent field?

* * * * * * *

A. That is my understanding.

Q. That the Company was required under the terms of that contract to make arrangements to get this additional supply?

A. That is my understanding.

Q. Now, on page 1, Exhibit No. 7, you have shown the total amount of revenue from the sale of gas in the Lexington District as $522,349.00, have you not?

A. Yes, sir.

Q. You show by this record that you are familiar with the fact that this Company was required to pay the Petroleum Exploration Company 40¢ a thousand cubic feet in order to get into Lexington this additional supply, are you not?

A. Yes, sir.

Q. And in your computation you allow three hundred thousand dollars as on the basis of 40¢ paid to the Petro-

leum Exploration Company for the deliveries called for under the contract of seven hundred and fifty million cubic feet?

A. That shows on page 2, yes sir."

* * * * * * *

Q. You do recognize the contract obligation with the "Pet. Ex."?

A. Yes, sir.

Q. Then why not recognize the other contracts?

A. The set up is not made in that way; it is made to show certain assumed°.

Counsel: (Interposing) It is made that way just because Judge Winn told you to make it that way?

The Witness: Judge Winn asked for it to be made assuming certain definite assumptions.

Q. And that is the reason you made it up that way?

A. Yes sir.

[fol. 231-b] CARTER EXHIBIT No. 8

Rate of Return for Lexington District, Using Various Values for Property of the Central Kentucky Natural Gas Company, Inc., and the Lexington Utilities Co., Inc., and Considering the Property of the Lexington Utilities Co., Inc., as a Part of the Integer

Earl L. Carter, Consulting Engineer, Indianapolis, Ind.

[fol. 231-b-1] "B"

Rate of Return for Lexington District Assuming

A. Various values for property of Lexington district of Central Kentucky Natural Gas Co., Inc. and of Lexington Utilities Co., Inc. combined.
B. 1926 operating expenses and revenues.
C. 750,000,000 Cu. Ft. gas purchased at 40c / M. Cu. Ft.
D. Balance of gas for total system at 12½c/M Cu. Ft.
E. Allocate to Lexington district portion of total gas purchased.
F. Net revenues available for return = $149,559.37.

Valuation bases	Rate of return	Price per M cu. ft. at which gas must be sold to net 7% return
I. Carter appraisal of physical property as of December 31, 1926, =$1,435,224.....	10.4%	$.363
II. Lexington portion of purchase price Central Kentucky Natural Gas Co., Inc. by Columbia, plus Carter appraisal Lexington Utilities, =$1,913,157.....	7.8%	$ .39
III. Carter physical appraisal, plus Kimball Intangibles, =$1,687,897.....	8.9−%	$.377
IV. Jirgal's cost of reproduction depreciated to Carter condition =$1,504,587.....	9.9+%	$.367
V. Jirgal's cost of reproduction depreciated to Kimball condition =$1,799,626.....	8.3+%	$.383

[fol. 231-b-2]

Sheet 1 Appendix to "B"

Revenues and Expenses for "Lexington District" (Central, Kentucky Natural Gas Co., Inc., and Lexington Utilities Co., Inc.) for Year Ending December 31, 1926, with Gas at 40c per M Cu. Ft. and Considering the Property of the Lexington Utilities Co., Inc., as a Part of the Integer

Gross Revenues from Operation		
Gas Sales (see pages 6 and 8, Ex. No. 4, F. B. and D.):		
Lexington Urban	$487,991.00	
Lexington Suburban	34,358.00	
Total Lexington District	$522,349.00	
Gasoline	6,339.00	
Shop	4,471.00	
Interest	836.00	
Miscellaneous	375.00	
Total gross revenues		$534,370.00
Operating Expenses (Adjusted)		
Field and Main Line Expenses	$27,539.00	
City Plant Expense	42,621.00	
General Expense	18,954.00	
Gas Purchased	244,669.63	
Total operating expenses		$333,783.63
Net revenues before taxes		$200,586.37
Taxes		29,765.00
Net revenue less taxes		$170,821.37
Depreciation charge		21,262.00
Net revenue available for return		$149,559.37

[fol. 231-b-3]

Sheet 2 Appendix to "B"

Field and Main Line Expense (See Pages 6 and 11, Ex. No. 4, F. B. & D.)		$27,539.00
City Plant Expense (See Pages 6 and 12, Ex. No. 4, F. B. & D.)		$42,621.00
General Expense (See Pages 6 and 13, Ex. No. 4, F. B. & D.)		$18,954.00
Gas Purchased: (See P. 14, Ex. No. 4, F. B. & D.)		
Net Available Purchased Gas for Entire System (1926) 1,819,261 M Cu. Ft.		
Cost of Gas:		
750,000,000 @ 40c/M Cu. Ft.	$300,000.00	
1,069,261,000 @ 12½c/M Cu. Ft.	133,657.62	
Totals 1,819,261,000 Cu. Ft.	$433,657.62	
Cost of Gas Purchased allocated to Lexington District on Basis of Gas Sales (See P. 17, Ex. No. 4, F. B. & D. 56.42%):		
56.42% of $433,657.62		$244,669.63

[fol. 231-b-4]

Sheet 3 Appendix to "B"

Taxes $29,705.00
(See Pages 6 and 25, Ex. No. 4, F. B. & D.)

Depreciation:

See Transcript of Testimony of Mr. Kimball on Pages 93, 94 and 95. Hearing Dates Dec. 12 and 13, 1928.

Estimated Annual Allowance Necessary for Extraordinary Maintenance (See P. 28, Ex. No. 4, F. B. & D.):

Central Kentucky Natural Gas Co., Inc.	$12,878.00	
Lexington Utilities Co., Inc.	8,384.00	
Total		$21,262.00

[fol. 231-c] CARTER EXHIBIT No. 10

[fol. 231-c-1]

Rate of Return for Lexington District (Central Kentucky Natural Gas Co., Inc.) (Lexington Utilities Co., Inc.)

Assuming:

(A) Various Values for "Lexington District" of Central Kentucky Natural Gas Co., Inc., and of Lexington Utilities Co., Inc., combined,
(B) 1926 operating expenses,
(C) Sale price of gas to be 60c/M cu. ft.
(D) 750,000,000 cu. ft. of gas purchased at 40c/M cu. ft.
(E) Balance of gas for total system purchased at 12½c/M cu. ft.
(F) Allocate to Lexington District its portion of total gas purchased and used.
(G) Consider Lexington Utilities property as a part of the integer.
(H) Net Revenue available for return—$400,551.57.

Valuation Bases:

	Rate of return
I. Carter appraisal of physical property as of Dec. 31, 1926, —$1,435,224	28.5%
II. Lexington portion of purchase price of Central Kentucky Natural Gas Co. Inc. plus Carter appraisal (Lexington Utilities)—$1,913,157	21.4%
III. Carter appraisal of physical property, plus Kimball intangibles—$1,687,897	24.3%
IV. Jirgal's cost of reproduction depreciated to Carter conditions —$1,504,587	27.2%
V. Jirgal's cost of reproduction depreciated to Kimball Condition—$1,799,626	22.8%

[fol. 232] List of Exhibits Filed Herewith

Company Exhibit No. 4.
Company Exhibit No. 6.
Company Exhibit No. 8.
Company Exhibit No. 9.
Carter Exhibit No. 7.
Carter Exhibit No. 8.
Carter Exhibit No. 10.

[fol. 233] Wherefore Central Kentucky Natural Gas Company, plaintiff and appellant, prays that the above

statement of evidence be settled, approved and allowed by the above-entitled court as a true, full and correct and complete statement of all the evidence on which this cause was submitted and essential to the decisions of the questions presented on appeal to the Supreme Court of the United States.

Dated January 16th, 1933.

D. L. Hazelrigg, Chester J. Gerkin, Henry T. Duncan, Attorneys for Plaintiff.

Service of the foregoing proposed statement of evidence and a receipt of and copy thereof this — day of January, 1933, is hereby admitted and acknowledged.

Robt. H. Winn, C. M. Harbison, Attorneys for City of Lexington et al. ——— ———, Governor of Kentucky. ——— ——— Attorney General for Commonwealth of Kentucky.

[fol. 234] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, Oscar Vest, and James Thatcher, Members Constituting said Railroad Commission; Bailey P. Wooton, Attorney General of the Commonwealth of Kentucky; City of Lexington, a Municipal Corporation, and S. B. Featherston, Individually and as Representing All Other Persons Similarly Situated, Defendants

AMENDMENTS PROPOSED BY THE APPELLEES TO THE APPELLANT'S STATEMENT OF THE EVIDENCE FOR THE APPEAL—Filed March 9, 1933

Lodged Jan. 31, 1933. S. W. Stacey, Clerk.

To the Clerk of the above-styled court:

In addition to the "condensed statement of pleadings before the Railroad Commission of Kentucky and evidence

essential to decision of questions presented on appeal" filed by the Central Kentucky Natural Gas Company in this cause on Monday, January 16, 1933, the appellees respectfully state that the following papers and testimony are also essential to a decision of the questions presented by this appeal; and you are requested and directed to take and make a transcript thereof to be filed in the Supreme Court of the United States pursuant to the appeal allowed herein, to-wit:

1. The gas purchase contract between the Central Kentucky Natural Gas Company and the United Fuel Gas Company of date of the first day of November, 1912, and as amended under date of the 15th day of July, 1913, being Exhibit No. 20 of the Central Kentucky Natural Gas Company's gas purchase contracts filed herein.

2. The gas purchase contract between the Central Ken- [fol. 235] tucky Natural Gas Company and the Kentucky Cities Gas Company of date of the 23rd day of July, 1920, with the amendments thereto filed as gas purchase contract No. 18 in the record herein.

3. The gas purchase contract between the Central Kentucky Natural Gas Company and the Bed Rock Petroleum Company of date of the 20th day of November, 1918, and filed as Exhibit No. 25.

4. The gas purchase contract between the Central Kentucky Natural Gas Company and the Hillsdale Gas Company of date of the 24th day of January, 1924, and filed as Exhibit No. 24.

5. The gas purchase contract between the Central Kentucky Natural Gas Company and Lewis Vincent of date of the 20th day of April, 1925, and filed as Exhibit No. 16.

6. The lease-hold contract between the Central Kentucky Natural Gas Company and the Lexington Gas Company, now Lexington Utilities Company, of date of the 15th day of December, 1905, and being Exhibit No. 21 of the Central Kentucky Gas Company's Exhibits filed herein.

7. An excerpt from the magazine "Hail Columbia" for the month of March, 1929, filed as an exhibit with the depo-

sition of D. C. Hunter taken in this cause before the Railroad Commission of Kentucky on March 11, 1929, and marked "D. C. Hunter No. 1" for identity, which excerpt is in words and figures as follows:

HUNTER EXHIBIT 1

"Know Columbin System

Maps showing the territory in the states of New York, Pennsylvania, Maryland, Kentucky, Ohio, West Virginia, and Indiana and some of the 1,962 communities served with gas and electricity by the operating companies of the Columbin Gas & Electric Corporation are presented as a supplement to this issue of Hail Columbin for the information and study of its readers.

Distributing gas to a population of more than five million people in the above states by means of 23,897 miles of field, transmission and distribution pipe lines with the aid of [fol. 236] compressors totalling 183,950 horsepower at 103 compressor statjons to 1,004,208 consumers, and electric power and light service from three major generating plants and several stand-by-stations with a total capacity of 450,695 k. v. a. over 8,573 miles of electric transmission and distribution lines, by means of 98 substations to 304,861 consumers in Southern Ohio and Northern Kentucky, Columbia System provides a unified, interconnected combination of super-fuel and super-power service."

Also exhibit No. 2 with said deposition of the said D. C. Hunter in nature the map referred to in the foregoing excerpt from said magazine.

Further as to said map Exhibit "Hunter No. 2" the Appellees respectfully represent and state to the Court that it is necessary for correct determination of this case, that the said original map and exhibit should be inspected by the Supreme Court, and that this Court and the presiding judges thereof so order and make such rule or order for the safe keeping and transporting of said exhibit as a part of the record in this cause to the Supreme Court, and for the return thereof to this Court as to this Court and the judges may seem proper; all as is made and provided in

Rule 10, Sub-section 4 of the Supreme Court of the United States.

8. Two certain letters of date of January 25th, 1929 and January 29, 1929, addressed by the Central Kentucky Natural Gas Company through T. J. Tonkin, Jr., its Vice President, to Mr. D. C. Hunter, filed in the record by consent on March 11, 1929, and which are in words and figures as follows:

No. 1

"Central Kentucky Natural Gas Company, Inc., 140 West Short Street, Lexington, Kentucky

January 25, 1929.

Mr. D. C. Hunter, Attorney, 700 Security Trust Building, Lexington, Kentucky.

[fol. 237] DEAR SIR: In compliance with your request, wish to advise that on December 31, 1926, there were in use in the City of Lexington, 9,143 gas meters; on December 31, 1928, there were 9,741. These figures do not include meters in use in sub-division-adjacent to but outside of the corporate limits.

Yours very truly, Central Kentucky Natural Gas Company, (Sgd.) T. J. Tonkin, Jr., Vice-Pres.
TJT:V."

No. 2

"Central Kentucky Natural Gas Company, Incorporated, 140 West Short Street, Lexington, Kentucky

January 29, 1929.

Mr. David C. Hunter, Assistant Corporation Counsel, Lexington, Kentucky.

DEAR SIR: Complying with your request made in your letter this date, wish to advise that on December 31, 1928, this Company had 940 meters in use in suburbs and subdivisions adjacent to, but outside the corporate limits of

Lexington. On December 31, 1928, this number had increased to 1,379.

Yours very truly, Central Kentucky Natural Gas Company, (Sgd.) T. J. Tonkin, Jr., Vice-Pres. TJT:V."

[fol. 238] 10. The testimony of LUCIEN BECKNER. condensed and in substance as follows:

I have been engaged in geological work for about twenty odd years, representing in the last ten or fifteen years in such work the Atlantic Refining Company, the Superior Oil Corporation, the Louisville Gas and Electric Company, the Texas Oil Company, a number of smaller ones and probably large ones that I do not now recall. My duties have been to determine geological conditions favorable or unfavorable for the production of oil and gas in Indiana, Mississippi, Texas, Oklahoma and Kentucky, largely in Kentucky. I have taken occasion to investigate the natural gas reserves in the eastern Kentucky fields. In pursuit of this investigation I have visited every county in that district and the geological strata in each of them by personal observation. I have traveled through them for some thirty odd years. I know practically all of that territory. I have put into table form the result of my investigation in these counties as to natural gas reserves, which table I now file as a part of my testimony, marking same "Beckner No. I". The left hand column names the counties; the figures in the right hand column, 1,129,937,880, represents the total of the gas reserves in the named counties in thousands of cubic feet, i. e., my estimate is that there are in these counties 1,129,937,880 thousands of cubic feet of gas. I make the following statement of my study and investigation:

"The following study is made for the purpose of determining the amount of gas underground in Eastern Kentucky, which may be made available for use by economic methods of production.

The plan adopted is to consider each "sand" or producing horizon serially, from the lowermost or oldest to the uppermost or youngest; outlining the area of each, subtracting therefrom those portions of each area which, for reasons hereafter set out, are deemed nonproductive or

nonworkable, and crediting what is left with a certain amount of gas per acre; which amount is determined by [fol. 239] the history of production from the "sand" considered. Conservatism was maintained by granting the lowest possible factor of production and a ruthless delimitation of the possible producing area.

When this study was begun it was the intention to base the results to be achieved on area, thickness and porosity of the "sand", or pay streak, in each formation which has proven productive; but the most exact, prolonged, and careful search for all known data on the Eastern field shows that there are not enough to do this. There are so few data on thickness because most often the "sand" is not drilled through, the drilling stopping in the top of the "sand" because there occurs the flow of oil or gas. There are no data on porosity; and while a porosity might have been assumed, such assumption would not have had the concrete value which the historic production, the method adopted, will have.

Over a large part of the field no exploration has been done, but the geologic conditions underlying such areas are generally well known, making it possible to say that they are part of a region which has the same geologic history, is underlaid by the same geologic horizons, filled with the same kind of rocks in about the same proportions which were laid down at the same time and in the same sea, as are and were the rocks of the area which has been explored. On this account the statement that they will be found to contain like proportions of oil and gas is not an assumption based on opinion alone, but a simple statement of known facts and, so far as human mind can see, their inevitable interpretations.

In delimiting the possible areas regard was had to the outcrops of the various formations discussed, their thicknesses as displayed by their outcrop and well measurements; the changes, if any, of the character of their sediments; their structure or altitudes, and their historic performances when drilled. All of which is set out below.

[fol. 240] The Sands

The Cambrian rocks in Kentucky are so deep seated they cannot be reached by the drill economically and so will not be considered.

The Ordovician

The Ordovician rocks have produced the "Trenton" oil fields of Ohio, Indiana, and Southern Kentucky and Tennessee. In Ohio, where they have done best, they are overlaid by the Utica black shale, a formation of carbonaceous content as much as 300 feet thick, from which many think its oil and gas are derived. On the outcrop of the Trenton in Kentucky this shale is missing; but going eastward it will be found in the deep wells, the 3,900 foot well at Denton, in Carter County, stopping in the first five feet of it; and wells elsewhere in Eastern Kentucky, even as far west as Powell County, showing black shales at about this horizon. However, the Trenton "sand" dips under from the surface in Fayette, Clark, Franklin, etc., to over 3,900 at Denton, making its exploration very costly, unless close to its western outcrop, and there it is not overlaid by the carboniferous Utica shale; or, if so, where it is very thin; also, little is known about the structure of this deep "sand", making its drilling as yet a precarious affair. Because of these facts the Ordovician sands are not included in the totals; but there can be little doubt but that they will produce gas in this State as they have elsewhere. The Lyons well in Menifee is said to have found a large gas flow in rocks of this age. Above the Trenton, in the Ordovician, are other "sands" which produce oil and gas in southern Kentucky. The great fold or buckle in the Ordovician rocks which occurs about 40 to 50 miles east of the axis of the Cincinnati geanticline (about the distance of the Lyons well mentioned above), might prove a valuable location.

[fol. 241]

The Silurian

Above the Ordovician lie the Silurian rocks. The Clinton oil and gas sand of Ohio is of this age, but the Silurian rocks of Kentucky have been rather small producers of commercial quantities of the hydrocarbons, unless the deeper "sands" of Allen, Warren, and Barren are Silurian, a thing which is not definitely known. In Eastern Kentucky a small Silurian oil pool was developed in Bath County, at Olympia, and in a few other places they have made shows. Because of this and the fact that the Silurian

rocks show that the age in which they were deposited was, in this part of the world, one of little rainfall, in which thin limes and red shales were deposited, poor in plant and animal life, the source of oil and gas, Silurian gas not included in the ultimate figures set out herein.

The Devonian

Arid conditions ended with the Silurian age and on top of the Silurian rocks lie limestones, dolomites and rich carbonaceous shales of the Devonian age. Consequently this age has a number of rich oil and gas horizons. At its base comes the Big Six "sand" of Breathitt County. This is a conglomerate dolomite, known on its outcrop as the Stormville Conglomerate. It has proven a rich producer in Breathitt, but is so deeply seated that it has not been explored, save in a very few wells, in the counties east; and seems to disappear in the counties west. It was found in the wells at Hendricks and the Whittaker well, both in Magoffin.

Above the Big Six is a limestone known as the Corniferous, of Onondago age, in which is a producing horizon known to the drillers as the Irvine or Campton or Canel City "sand". This is producing throughout the State wherever structural and outcrop conditions permit and where it has been drilled. The old Menifee gas field is in it. It was in an effort to reach it that the overlying black shale was found to be so rich in gas.

[fol. 242] This shale known as the Ohio and Chattanooga to the geologist and merely "black shale" to the driller is from five to seven hundred feet thick where it is producing, and towards the northeast includes beds of sandstone from five to fifteen feet thick, in which the gas is found and which the drillers around Ashland are calling the "Gordon sand". In the south these sand lenses do not occur but the gas is found in the shale itself as it is in Meade County in Western Kentucky. Its producing record in the eastern field is too short to permit much definiteness and, therefore, its cubic foot-acre content is given very low. But the wells at Ashland have a remarkable history and the old Refitt well in Floyd has produced—wasted—a vast amount of gas; and the wells in Meade County, Western Kentucky, are marvels. One of the latter is the Smith well, drilled in 1888

and blew open until July, 1891, when it was connected with the pipeline. It was disconnected from March till June, 1897, because of legal quibbles, since which it is a steady producer. In 1892 its closed pressure rose to 64 lbs. In May, 1899, it tested 31 lb. rock pressure and 267,750 cubic feet open flow. In August, 1911, it was 24 lbs. and 103,500 open flow. And in January, 1929, its last test, it showed 25 lbs. and 168,000 cubic feet. Its first measurement after it came in in 1888 showed 1,140,000 cubic feet per day.

In spite of the records of the Big Six, the Irvine and the Black Shale, the Devonian is credited with very small acre content, because of its depth eastwardly, and the consequent ignorance of conditions economic and geologic, which indicate conservatism in statement. It could safely be given twice as much or perhaps three times.

The Mississipian

The Mississippian "sands" are so many and rich that they have had to be divided into three vertical divisions. [fol. 243] The lowermost, called herein the Lower Mississippian, contains in the eastern part of the district the Berea and Wier, and in the southern part, the Beaver Creek. They have produced quantities of gas in favored locations, but have been drilled altogether for oil, the probable gas locations being avoided. On account of the lack of information such a history promotes, these "sands" are given a very small—almost negligible—cubic foot-acre factor. One good field in either of them would make as much gas as the whole district is accorded.

The Middle Mississippian

The "sands" under this heading are the Big Lime, Keener, Big Injun, and Squaw. Their names bring up memories of great production in nearby West Virginia and they have produced in places in Kentucky; but their history in the western margin of the Kentucky field, where they have been drilled to and where they are quite shallow, has been such that it was thought safer to follow the record of that section rather than that of the West Virginia section; although conditions in the eastern margin of the Kentucky field approach nearer to West Virginia. Therefore, they have been given the lowest cubic foot-acre value

of the whole list, making for them a showing which they have doubtless already exceeded with a very small exploration.

The Upper Mississippian

Above the last lie a series of sands and shales, with an occasional limestone, of Chester age, filling the vertical space between the Big Lime and the base of Pennsylvania or coal bearing series. The gas in them occurs in the sandstone lenses, which are from 10 to 100 feet thick, averaging about 50 feet. The amount of gas they have produced in the last few years, from a restricted area, is very large. They have been the standby of the Kentucky producer, until the recent black shale development. On this account their historic value is so well understood that they have [fol. 244] been given the largest cubic foot-acre factor of any, making their total reserves the greatest, although their areal extent is low. This advantage they have because their shallowness has induced their exploration, which has supplied the needed information. The names of these sands are Maxon and Bradley. They are so much alike that the drillers do not always know them apart, causing the well records to be slightly mixed at times, but the effect is just the same.

The Pennsylvanian.

Above the last lie the shales, sandstones, and coals of the Pennsylvanian age. The "sands" are sandstones of from 30 to 300 feet thick, and are named, in the eastern area Beaver, Horton, Pike and Salt; and in the southern area, Wages, Jones, Epperson. Of these, perhaps, the Salt Sand has proven the best producer; but the drillers are apt to call any thick sand at the base of the Pennsylvanian, which produces gas and salt-water, the Salt Sand. However, one, at least, of these basal Pennsylvanian sands, nearly always produces gas. In the past salt water, which practically always accompanies it, has injured these wells; but today better handling is caring for the gas and eliminating the water problem. The sands have been given a medium cubic foot-acre factory only because ultra conservatism prompts it.

Structure

General structural conditions in eastern Kentucky are now known; and their relations to oil and gas production are fairly well understood. In delimiting the field of any particular "sand" advantage has been taken of all published data on structure and such private data as was deemed trustworthy and was available. If errors have been made they are of small amount and are to be found in the deeper "sands", which have been given reduced cubic foot acre values to compensate.

[fol. 245] Summary of Methods

The methods of arriving at the figures set out in the table are in brief as follows:

A. Giving each group an estimated cubic foot-acre value as follows:

1. Devonian, Silurian, and Ordovician (the latter two really nothing), 100 thousand cubic feet per acre.
2. Lower Mississippian, 25 thousand.
3. Middle Mississippian, 10 thousand.
4. Upper Mississippian, 400 thousand.
5. Pennsylvanian, 100 thousand.

B. Eliminating all acres in each county:

1. Where the "sand" is not well covered and at a safe distance from the outcrop;
2. Where the logs do not reveal sufficient thickness of producing "sand";
3. Where the history of exploration shows no production;
4. Where depth to the "sand" is over 5,000 feet;
5. Where exploration has been accomplished;
6. Where major synclinal conditions preclude the probability of gas productions.

C. Eliminating whole counties:

1. Where reserves are too low for commercial exploration;
2. Where from a consideration of depths, pressures and amounts would be too low for getting into pipelines or permit building of compressors;

3. Where structural conditions preclude;
4. Where exploitation is already accomplished;
5. Where there is not thickness of "sand".

D. Eliminating 25% of the Devonian and lower because its limited area of exploration does not permit of application of items 2, 3, and 5 in Section C above.

[fol. 246] **Example**

That the figures above are ultra conservative might be shown by many examples in the field. One is found in Floyd County where the table herein gives 65 billion cubic feet from all sands; whereas, the companies operating there are contracted to supply more than that and practically all of them are supplying it, from the Upper Mississippian and Salt Sands.

The Table

The following table sets out compactly the estimates of reserves by counties, made in accordance with the rules above set out. It is not intended for a statement of the possible or probable gas production of the future; had that been the intent the figures could have been swollen to much larger totals with considerable plausibility; but the intent has been to be so conservative as to not mislead but throw such light of truth, on a question of importance to all, as the known data permit. In making such a table there is and should be an allowable margin of error; but the conservatism of statement in these figures obviates danger from such a source because if certain localities should be credited with gas where future drilling finds none, the purpose-full under-statements will make good such deficiencies. The figures represent thousands of cubic feet, running the total to over one trillion.

The table to which I have above testified and filed as "Beckner No. 1" is as follows:

[fol. 247]

BECKNER EXHIBIT No. 1

	Counties	Devonian	Low. Miss.	Mid. Miss.	Up. Miss.	Pennsylvanian	Total
1.	Pike	18,048,000	8,512,000	4,377,600	155,648,000	9,728,000	196,313,600
2.	Leslie	19,056,000	6,352,000	2,540,800	101,632,000	25,408,000	154,988,800
3.	Letcher	3,456,000	44,564,000	1,782,560	71,302,400	15,597,400	136,702,360
4.	Perry	20,076,000	4,824,000	1,920,800	77,184,000	2,140,000	106,144,800
5.	Knott	12,225,600	4,910,400	1,309,440	52,377,600	13,104,400	83,927,440
6.	Floyd	23,181,000	4,404,400	235,360	30,201,600	7,550,400	65,572,760
7.	Knox	12,672,000	2,816,000	675,840	27,033,600	6,758,400	49,955,840
8.	Clay	18,645,600	3,756,000	1,462,400		14,264,000	38,128,000
9.	Carter	26,136,000	4,120,000	824,000			31,080,000
10.	Martin	10,308,000	1,408,600	573,400	17,203,200		29,493,200
11.	Laurel	17,203,200	7,504,400	863,100		2,867,200	28,437,900
12.	Greenup	21,337,800	4,070,400	203,520			25,611,720
13.	Whitley	14,872,000	7,298,800				22,170,800
14.	Pulaski	18,086,000	2,412,800				20,498,800
15.	Boyd	14,580,000	1,600,000	448,000			16,628,000
16.	Magoffin	13,530,000	480,000				14,010,000
17.	Breathitt	13,824,000					13,824,000
18.	Lewis	13,716,550					13,716,550
19.	Elliott	11,266,000	1,224,000	163,200			12,653,200
20.	Jackson	11,793,600					11,793,600
21.	Rockcastle	10,323,800					10,323,800
22.	Rowan	9,072,000	216,000				9,288,000
23.	Owsley	8,569,550		695,500			9,265,050
24.	Morgan	9,000,000					9,000,000
25.	Johnson	3,320,850	851,200				4,172,050
26.	Menifee	3,820,800					3,820,800
27.	Wolfe	3,442,350					3,442,350
28.	Wayne	2,961,000					2,961,000
29.	Lawrence		1,496,600	897,960			2,394,560
30.	Lee	1,920,000					1,920,000
31.	Powell	1,698,900					1,698,900
	Total	368,142,600	112,821,600	18,973,480	532,582,400	97,417,800	1,129,937,880

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[fol. 248] I further state that from my experience as a geologist and from my actual information as gained from these visits to these sundry counties and from my investigation of geological conditions there, the foregoing figures in my judgment run under the actual reserves.

There are other gas bearing sands than those named in my table to which I have not given the reserve value to which I think they are entitled. There is the Black Shale which is producing in quantities mostly along the Big Sandy tier of counties. I have attempted to put nothing in this table about sands lying underneath the Devonian. There are such sands like the Trenton which we have in Kentucky, but about which we don't know very much because it is very deep, and we have not drilled to it. My table does not include this Trenton sand which is producing in nearby states.

I have gone over and familiarized myself with the amount of gas consumed annually here in Kentucky by the customers of the Central Kentucky Natural Gas Company and the wholesale companies to which it sells, and as well in the City of Louisville which draws its gas in large part from West Virginia and Eastern Kentucky. The total annual consumption in the roughest sort of way is about 10 million feet annually drawn from both Kentucky and West Virginia. If all of this gas were drawn from Kentucky and continued at the same figure of consumption and if my reserve figures are right, there would be about 100 years of consumption and production in and from the Kentucky supply.

Q. Mr. Beckner, are you at all familiar with the prevailing price of natural gas at wholesale in the eastern section of the state?

A. Probably I am, yes sir.

Q. Are you now connected with the Louisville Gas and Electric Company?

A. I receive a retainer from them.

[fol. 249] Q. Do you have occasion at present to be informed about the gas situation and gas prices?

A. In a general way I do. I gather that up from the ones I meet.

Q. From your knowledge and from what you gather up, what would you say was the present average wholesale

market price of gas obtaining in Eastern Kentucky for natural gas?

A. Between ten and twelve cents; might be a little more in West Virginia, but in Kentucky that is about right."

11. The exhibit put into the record known as the Holly W. Stevenson Exhibit, in nature a letter from E. Reynolds, Jr., Vice-President of the Columbia Gas and Electric Corporation of date January 18, 1929 to the Security Trust Company of Lexington, Kentucky, "Attention of Mr. Holly W. Stevenson, Bond Department", dealing with the sale of the stock of the Central Kentucky Natural Gas Company to the Columbia Gas and Electric Corporation, which exhibit and papers are as follows:

HOLLY W. STEVENSON EXHIBIT

"Columbia Gas & Electric Corporation, Wilmington, Del.,
61 Broadway, New York

Edward Reynolds, Jr., Vice-President & Secretary

January 18, 1929.

Security Trust Company, Lexington, Kentucky.

Attention of Mr. Holly W. Stevenson, Bond Department

DEAR SIRS: I acknowledge receipt of your letter of January 16, 1929, requesting a copy of the circular letter to the stockholders of Central Kentucky Natural Gas Company offering them the right to exchange their stock for [fol. 250] Preferred Stock of Columbia Gas & Electric Corporation.

We did not send out any such notice directly, but our contract for the purchase of the Central Kentucky stock was made with certain of the large stockholders, and provided that they would transmit the same offer to the other stockholders, subject to a charge of $1.00 per share of Central Kentucky stock to cover expenses.

There are enclosed for your information copies of a letter dated November 17, 1927, sent out by the three principal officers of the Central Kentucky Company to their stockholders, a letter of instructions sent to the stockholders by Pittsburgh Trust Company as depositary and

the form of covering letter sent out by the depositary to be returned with the certificates and showing the two alternative methods of computing the number of shares of Columbia Preferred Stock and the cash adjustment for fractions, which I trust will give you the information you want.

Yours very truly, E. Reynolds, Jr., Vice-President.

HHP:CK.
Enc.

Central Kentucky Natural Gas Co. (Incorporated)

Oil City, Pa., November 17, 1927.

To the Stockholders of the Central Kentucky Natural Gas Company:

Your Board of Directors desires to recommend the acceptance of the offer described in the Secretary's notice of meeting of stockholders enclosed herewith and your approval and acceptance of the reorganization plan calling for an exchange of 60,000 shares of stock of the Central Kentucky Natural Gas Company at the rate of one share of Preferred Stock of the Columbia Gas & Electric Corporation for 2¼ shares of the stock of the Central Kentucky Natural Gas Company, on terms and subject to the provisions described in said notice.

This plan of reorganization or exchange of shares was approved by the Board of Directors unanimously. One of the conditions of the acceptance was that an opportunity be given to each stockholder of the Central Kentucky Natural Gas Company to exchange his stock under this plan of reorganization, subject to the payment in stock or money of his proportionate share of the expenses and charges as will necessarily be incurred in carrying out the plan of reorganization outlined, which charges and expenses by agreement have been liquidated at $1.00 per each share of Central Kentucky stock exchanged thereunder.

The strong position of the Columbia Company is well known. Its shares are listed and regularly quoted on the New York Stock Exchange, and full information regarding its properties and standing is readily available.

We call your attention to the fact that you are at present receiving on your Central Kentucky shares, dividends [fol. 251] at the rate of 37½¢ per share per quarter. By accepting Columbia Gas & Electric 6% Preferred Stock you will immediately receive an increased return of more than 70%. If this plan is accepted you will receive on the Preferred Stock of the Columbia Company, for which your stock is exchanged, the quarterly dividend of $1.50 a share on February 15, 1928, and the next dividend on your Kentucky Company stock, payable on January 15, 1928, will go to the Columbia Company. The adjustment which would otherwise be chargeable against you, will be absorbed in the $1.00 per share expense above mentioned.

We are informed by counsel that the proposed exchange of stock will result in no profit or loss to our stockholders taxable under the Federal Income Tax Laws.

We feel it is very desirable that the stockholders authorize, ratify and confirm the approval and acceptance of the reorganization plan submitted and that the stock should be fully represented at the stockholders meeting, so if you are unable to attend in person you are requested to execute enclosed proxy and mail it in the stamped envelope enclosed herewith to the Secretary of the Company.

Very truly yours, (Signed) Joseph Seep, Chairman of the Board. (Signed) John Tonkin, President. (Signed) Robert S. Hampton, Secretary & Treasurer.

Pittsburgh Trust Company, Pittsburgh, Pa.

Member Federal Reserve System

Capital Surplus and Profits: $4,600,000.00

Depositary Agreement

To the Stockholders of the Central Kentucky Natural Gas Company:

The Pittsburgh Trust Company agrees to act as Depositary of your respective Stock certificates and to exchange them for Certificates of Preferred Stock of the Columbia Gas & Electric Corporation pursuant to the offer of that company on the following terms and conditions:

[fol. 252] 1st. Your Certificates should be endorsed in blank for transfer (and in case the Depositor is acting as an executor, or in other fiduciary capacity, accompanied by proper proof of authority) and mailed by Registered Mail, or delivered to the Depositary company at the above address without delay. Certificates not received prior to the 30th day of December, 1927, may be refused and returned.

2nd. The depositor authorizes the Depositary to buy sufficient fractions from other Depositors to make a full share where his fraction of a Preferred share is one-half or more, and similarly to sell his fraction to another Depositor where less than one-half, the price of the fraction bought or sold to be determined by the market price of such Preferred stock at $108.00 per share.

3rd. The charge of One Dollar per share (which covers the entire cost and expense of negotiating this Reorganization Plan and of exchanging Certificates, including commission, attorney's fees, transfer or stamp tax, printing and postage, adjustment of dividends and the Depositary's charge and expenses), if not paid by the Depositor by check at the time of the deposit of his Certificates, will be taken care of by a proper proportionate deduction in making the exchange.

4th. If, for any reason, the exchange of Certificates is not made on December 30, 1927, the date agreed upon, the Depositor agrees to leave his Certificates on deposit with the Depositary until the exchange is made, or until February 1, 1926, after which date, on request in writing made by the Depositor, the Depositary agrees to return the Depositor's Certificates to him by Registered Mail.

5th. The depositary will promptly notify each stockholder as soon as the exchange has been made, and of the amount, if any, due from him on account of the purchase for his account of any fractional shares, and if no amount is due, or upon payment thereof, will deliver or mail by Registered Mail to them respectively their Preferred share Certificates with a check for any amount due from the sale of any fractional shares.

6th. The depositor understands that the Depositary assumes no obligations other than those above set out, except the exercise of due and reasonable care hereunder.

7th. A copy hereof will be forwarded to each stockholder by your company's secretary, accompanied by a form of letter showing the computations made in your particular case and for your use in forwarding your Certificates to the undersigned Depositary. Receipt of your Certificates will be promptly acknowledged.

Respectfully, Pittsburgh Trust Company, by J. H. McGinnity, Secretary.

[fol. 253] (Please use this form in forwarding certificates for deposit.)

Pittsburgh Trust Company, Depositary, 323 Fourth Avenue, Pittsburgh, Pa.

Dear Sirs: I enclose endorsed in blank for deposit under the Depositary Agreement received herewith, the following Stock Certificates for capital stock of the Central Kentucky Natural Gas Company:

No. of certificates	Name	No. of shares

Total number of shares _____

The above total number * of shares checks with the number shown below.

I choose Plan "A" below:
"B"

Plan "A"

10* shares appearing on books in my name, exchange 2¼ for 1 of Columbia Gas & Elec. 6% Pfd. give 4.4/9 shares.

*If this figure does not check please ask for corrected computation.

**If your choice not indicated, and unless check is enclosed for $1.00 per share plus or less cost of fractional shares, Depositary will assume Plan "B" is accepted by you."

Share of expense of $1.00 per share is $10.

Buy (if above fraction is ½ or over) of 1 share Columbia Gas & Electric at 108.

Sell (if above fraction is less than ½) 4/9 of 1 share Columbia Gas & Electric at 108, $48.

Total payment under plan "A", $38.

Pfd. Stock Certificates of Columbia Gas & Elec. are to be forwarded to me for 4 shares.

Plan "B"

2¼ shares of your stock for 1 share Columbia Gas & [fol. 254] Elec. at 108 gives $48 per share, less $1.00; my share of expense gives $47 net. Your 10 shares at $47 gives $470.

$470 divided by 108 gives 4.35 shares Columbia Gas & Electric.

Buy (if above fraction is ½ or over) of 1 share Columbia Gas & Elec. at 108, $——.

Sell (if above fraction is less than ½) .35 of 1 share Columbia Gas & Elec. at 108, $37.80.

Total credit under Plan "B", $——.

Pfd. Stock Certificates of Columbia Gas & Elec. are to be forwarded to me for 4 shares.

Respectfully,——.

12. Balance sheets taken from the books of the Central Kentucky Natural Gas Company and filed by Mr. T. J. Tonkin, Jr., as Exhibits "T. J. Tonkin 1926" and "T. J. Tonkin 1927" are as follows:

[fol. 255]

EXHIBIT "T. J. TOMKINS, 1926"

Central Kentucky

Trial Balance Dec. 31, 1926

Assets

Plant account:			
General	$2,719,791.25		
Winchester City Plant	88,984.65		
Mt. Sterling City Plant	43,554.53		
Johnson-Magoffin Line	23,455.37		
Red Bush Line	25,982.96		
Red Bush Compressor Station	69,270.31		
Red Bush Wells	64,065.32		
		$3,035,104.38	
Less Depreciation to Dec. 31, 1925		1,456,400.65	
			$1,578,703.73
Liberty bonds			1,000.00
Cash in banks			34,191.92
Cash impounded in trustee banks:			
First and City National	45,524.34		
Guaranty Bank & Trust Co	67,859.22		
Total Lexington		113,383.56	
The Winchester Bank		25,690.26	
Traders National (Mt. Sterling)		13,890.10	
			152,963.92
Value of gas stored:			
To Dec. 31, 1925: 3,351,561 M. cu. ft.		389,340.77	
During 1926: 314,632 M. cu. ft.	45,747.60		
Contingent Value Gas Stored 1926	10,188.53		
		55,936.13	
Total 3,666,193 M. cu. ft.			425,276.90

Material and merchandise:			
Lexington		4,562.45	
Winchester		1,378.97	
Mt. Sterling		610.60	
			6,551.02
Accounts receivable:			
From Consumers:			
Lexington	82,843.41		
Winchester	18,892.51		
Mt. Sterling	9,721.38		
		110,857.30	
From Shop Sales:			
Lexington	1,708.59		
Winchester	1.50		
		1,710.09	
From Disbursing Agents:			
H. J. Hutchinson, Agent	1,174.97		
J. T. Hastings, Agent	27.92		
T. J. Tonkin, Agent	220.52		
T. J. Tonkin, Supt.	793.61		
		2,166.18	
From Others:			
Blue Grass Natural Gas Co	1,602.90		
Kentucky Utilities Co	7,338.95		
Hillsdale Gas Co	25,272.04		
Miscellaneous	379.65		
		34,593.54	
			149,327.11
Contingent accounts receivable:			
Blue Grass Natural Gas Co		1,063.87	
Kentucky Utilities Co		14,185.87	
			15,249.74
Expenses:			
General		92,287.09	
Field and Main Line		77,276.73	
City Plant		61,899.68	
Lexington Plant Rental		59,720.11	
			291,183.61

[fol. 256]

Contingent expense:			
Lexington Plant Rental			15,228.90
Expense—Gas Purchased			386,953.24
Contingent Expense—Gas Purchased			66,905.25
Profit and Loss Suspense			63,730.98
Dividend Account			90,000.00
			$3,277,236.27

Liabilities

Notes payable:			
Oil City Trust Co			$300,000.00
Accounts Payable:			
Meter Deposits:			
Lexington		$6,045.00	
Winchester		828.00	
Mt. Sterling		58.00	
			6,931.00
Unclaimed Meter Deposits			14.25
Other accounts payable:			
Red Rock Petroleum Co.		1,034.95	
Boston & Southwestern Oil & Gas Co		592.30	
Carroll Oil and Gas Co		1,648.65	
East Kentucky Oil Co		198.49	
Eastern Kentucky Oil Co		143.50	
Fearless Oil & Gas Co		124.70	
George & Touma		615.73	
J. T. Hare & Son		294.00	
Hilladale Gas Co. (Gas Account)		9,547.80	
Alemander Kelly		410.70	
Kentucky Cities Gas Co		1,101.37	
McNabb & Cheuvront		180.20	
Martin Oil & Gas Co		188.30	
Petroleum Exploration Co		557.25	
Portamouth O. K. Gas Co		148.80	
Pu-John Oil Co		453.10	
United Fuel Gas Co		12,462.60	

Lewis Vincent		215.40	
Lexington Utilities Co		1,620.22	
U. S. Internal Dept		13.20	
Frankfort, Kentucky Natural Gas Co		24,568.80	
Miscellaneous		7,463.16	
			63,583.13
Unpaid Taxes			12,371.62
Contingent Accounts Payable:			
Lexington Utilities Co		15,228.90	
United Fuel Gas Co		47,756.30	
Hillsdale Gas Co		18,683.83	
Kentucky Cities Gas Co		3,684.22	
Petroleum Exploration Co		2,824.12	
Red Rock Petroleum Co		4,145.31	
			92,322.68
Earnings:			
Gas		895,071.14	
Gasoline		11,235.70	
Shop		6,091.31	
Miscellaneous		585.70	
Interest		1,481.41	
			914,465.26
Contingent gas earnings:			
Lexington	$121,600.46		
Lexington Suburban	8,558.95		
Winchester	29,378.41		
Mt. Sterling	15,685.20		
		175,223.02	
Sales to other companies		15,249.74	
			190,472.76
[fol. 257]			
Bad Debts Collected			79.43
Profit and Loss			196,996.14
Capital Stock			1,500,000.00
			$3,277,236.27

EXHIBIT "T. J. TONKINS, 1927"

Central Kentucky Natural Gas Company

Balance Sheet, December 31, 1927

Assets

Property Account		$3,106,472.07
Liberty Bonds		1,000.00
Cash	$8,650.77	
Accounts Receivable, Customers	110,761.67	
Accounts Receivable, Others	86,925.95	
Materials & Supplies	8,761.36	
Value of Stored Gas	511,287.50	
		726,387.25
Prepaid Accounts		2,370.66
Contingent Accounts:		
Lexington Plant Rental	29,826.82	
Gas Purchased	140,165.27	
Accounts Receivable, Customers	49,456.31	
		218,448.40
Cash Impounded in Trustee Banks		309,005.42
		$4,363,683.80

Liabilities

Capital Stocks		$1,500,000.00
Notes Payable	$380,000.00	
Accounts Payable	104,109.82	
Accrued Taxes	66,493.90	
		550,603.72
Customers' Deposits	7,146.00	
Other Deferred Liabilities	28.40	
		7,174.40
Renewals, Replacements and Depletion		1,662,062.69

[fol. 258]

Contingent Account Payable	188,401.81	
Contingent Gas Earnings	358,461.73	
		546,863.54
Surplus		96,979.45
		$4,363,683.80

13. Excerpts from the testimony of John T. Kimball as taken under a cross-examination by Counsel for the City of Lexington on December 12-13, 1928. "I am that same John T. Kimball of the Ford, Bacon and Davis organization, who compiled the tables used in the valuation and return testimony for the Central Kentucky Natural Gas Company in this cause.

Q. Mr. Kimball, I think we would get along much better if we understand in the beginning that what you testify about is matters of your own knowledge and not what you get second-hand from other people. Have you any personal knowledge of whether Ford, Bacon & Davis have any

monetary interest in the Lexington Utilities Company?

A. The only way I could obtain that knowledge is by having them tell me, and they said they had none.

Q. Do you know of your own knowledge?

A. They told me they did not.

Q. We ask the Commission to exclude the hearsay evidence.

A. Yes, you must only tell what you actually know.

Q. While we are on the question of this hearsay knowledge, you filed Exhibit No. 1 and Exhibit No. 4 with your testimony, which we have here at this time. A good many statements are made in the opening remarks about the valuation shown in Exhibit No. 1. Do you undertake to say that the matter shown in Exhibit One is true, of your knowledge?

[fol. 259] A. All of the statements contained in Exhibit No. 1—and I personally dictated all of the text accompanying that exhibit—were prepared by men working under my direction. In the compilation of unit prices, before those unit prices were applied to an inventory, they passed over my desk and I had an opportunity to review them; but I didn't give a personal check, didn't sit down and make up every figure and go through every figure in Exhibit No. 1. With that explanation, Exhibit No. 1 is my report.

Q. To be a little more explicit, I find on page four of Exhibit No. 1, to illustrate, that the Central Kentucky Gas Company produced during the year ending December 31, 1926, 220,148,000 cubic feet of gas. Have you any personal knowledge as to the accuracy of that statement?

A. That statement was taken from a report compiled by the Company from its measurement of gas.

Q. So you haven't any personal knowledge of that?

A. No, I didn't measure the gas.

Q. I find on the next page the statement that in the Red Bush Field there are 1,135 acres of leased territory. Have you been to the Red Bush Field?

A. No.

Q. I find the further statement that they had twenty-nine producing gas wells of an average depth of 795 feet. Have you seen and counted those wells?

A. I have counted the logs which showed the materials in those wells, at least a man under my direction did so.

Q. You didn't even do that personally?

A. No.

Q. And whether there are twenty-nine, forty, or fifty, you have no personal knowledge?

[fol. 260] A. Except as some man under me reported to me.

Q. In your inventory, I find a small item, but one worthy of note, perhaps, that you have inventoried at the Menifee Field certain live stock as property of the Company. How did you ascertain that this live stock was the property of the Central Kentucky Natural Gas Company?

A. In all matters of that kind we have to be guided by information which is handed to us by the Company.

Q. Were you handed any such information by the Company?

A. Only verbally expressed by them.

Q. To you?

A. To my representative.

Q. As a matter of fact, if it chanced to be true that that live stock was not owned by the Company but is the personal property of Mr. T. J. Tonkin, Sr., the father of the Vice-President of the Central Kentucky Natural Gas Company, then whoever gave you that information deceived you, did he not?

A. On that hypothesis.

Q. Have you any knowledge of your own as to whether or not the figure 29 or the figure 27.4 are the correct figures for that pipe?

A. I didn't personally look at the pipe.

Q. Did you look at the Company's books to ascertain what size pipe they bought and paid for when the pipe was laid?

A. That was done by men working under my direction.

[fol. 261] Q. And you undertake to say that they found out by the Company's books that that was 29 pound pipe?

A. That is what they reported to me.

Q. And you, of course, don't know that that is correct and don't undertake to say?

A. No.

* * * * * * *

Q. Let's turn again, seeking for accuracy, to page 103 of your Exhibit No. 1. You have listed at Winchester, Kentucky, as property of the Company two Ford cars, one of them No. 8380144 and the other 13316505. Did you see these cars yourself and get the numbers from them?

A. No.

* * * * * * *

Q. Now, just as a matter of instance, you have listed these two cars, one of them as being a 1923 model runabout and the other a 1926 model Ford of the same type runabout, with box body. You have valued them jointly at $799 and have taken off $100 depreciation apparently on each car. Is that correct?

A. No.

Q. Then what have you done?

A. There has been $240 taken off as depreciation for the two cars.

Q. All right; how much of that applies to the 1923 model?

A. I would have to refer back to our working papers, and will do so if you desire, if I haven't them here in the room. They consist of eighteen envelopes and thousands of sheets.

Q. You do undertake to tell the Commission that in your judgment two Ford cars which you have never seen, one of them purchased in 1923 and the other purchased in 1926, at the end of December, 1926, had depreciated in value only [fol. 262] $120 each?

A. No, I don't attempt to say that at all; the two cars together had depreciated $240.

Q. How much then did the 1923 car depreciate?

A. I have told you that I would have to refer to the working papers and advise you later.

Q. But you don't know anything yourself about its condition, good or bad?

A. I didn't see the car.

Q. You are willing, however, to state as a matter of fact that those two cars had only depreciated $240 during that time?

A. That was the information of the man that reported it to me.

Q. That wasn't your opinion based on your observation at all?

A. No, sir.

* * * * * * *

Q. Did you get the freight rates yourself?

A. No.

Q. You don't know what the correct freight rates were then save as they were reported to you by somebody else?

A. That is right.

Q. To what points did you estimate the deliveries of this pipe in your freight charges?

A. To the most convenient sidings from which pipe could be hauled to the plant.

Q. What were those sidings?

A. I don't have a list of them; they are in my working papers. I could look them up; they are in my working papers.

Q. But you yourself don't know where the pipe was hauled to?

[fol. 263] A. Except as in the working papers.

Q. And you yourself have not undertaken to get a freight rate to those points?

A. I have not personally done so.

* * * * * * *

Q. You will understand that the purpose of the examination so far has been, in a large part, to test your own personal knowledge of these matters. Did you go to the various points where this pipe might have been unloaded and make any examination as to labor costs?

A. I didn't personally do this work. It was done under my direction.

Q. Did you attend yourself to the ascertainment of the cost of any hauling in that territory to the nearest depots, to the place where the pipe was to be deposited finally?

A. That same remark that I just made applies to that.

Q. Where were you when this work was being done, in so far as you know that it was being done, where were you physically?

A. I was here one day or so, something like that, but I can't recall now where I was all that time.

Q. By "Here" do you mean Frankfort?

A. In Lexington, Kentucky.

Q. One day, possibly two?

A. I don't remember now.

Q. Not exceeding two days?

A. I don't think so.

. . . . . .

Q. Have you made any effort to ascertain what in fact the company did pay for the Rights of Way?

A. I haven't ascertained that; but these prices, I have [fol. 264] no doubt, were more than the company would have had to pay twenty-odd years ago, before a farmer knew anything about them going through his territory.

. . . . . .

Q. Now, you have valued the entirety of the property as under your figures at $4,715,434, which during twenty years of life you have depreciated to $4,280,627—or deteriorated. What per cent of deterioration is that during the twenty years of the life of the Company?

A. Well, that isn't quite the way to express it.

Q. Do you mind calculating and telling what percentage $434,867 is of $4,715,434?

A. I will make the computation for you. (The witness does so.) That is 9.4 per cent.

Q. Which during the twenty years meant that the entire properties of the Companies, according to your estimates here, have deteriorated slightly under one-half of one per cent per annum.

A. Absolutely not. I can come here thirty years from now, and if the Company continues, it will be in that same relation, and as the property wears out it substitutes new property, so that it remains the same practically from year to year.

. . . . . .

Q. What do you mean, "amortization"? What is the ultimate end of building up and creating that fund?

A. Amortization is to return to the owners of the property the value of that property after, for natural gas purposes, it is fully depleted and it then has no further value as a natural gas utility.

Q. And you have taken that in this instance at twenty years?

[fol. 265] A. I have predicted these figures on an estimate of twenty years.

Q. And what rate of per cent have you utilized in using an annual charge of $94,668?

A. I have assumed that that sum would be invested in Federal Government securities, which would yield around 3½ per cent, and that plus the interest accretions at the end of the twenty year period would add up to the amortizable value of the property, which would at that time have no value.

Q. So that is what you mean by amortization fund?

A. Yes.

Q. At the same time that you build up this amortization fund, you make an outlay of earnings each year of $20,000 necessary to keep the property in A-1 condition?

A. That is right.

Q. Is that justifiable?

A. Yes.

Q. To cover the cost in both ways, take out amortization fund on your property and also take out a fund to keep the property in 100% condition each year?

A. Of course, the amortization fund is not to take the place of the property, but to take care of the securities and hand it over to the owner at the end of twenty years. The $20,000 is to take care of the depreciation.

* * * * * * *

Q. Do you know anything about the sale of the Central Kentucky Natural Gas Company to the Columbia Gas and Electric Company since this franchise was entered into?

[fol. 266] A. I merely know that there was an exchange of securities.

Q. Do you know at what price per share the capital stock of the Central Kentucky Natural Gas Company, of one million five hundred thousand dollars of capital, was sold to the Columbia Gas and Electric Company?

A. It was not sold for cash, I understand; just an exchange of securities.

Q. Do you know at what price, at what rate, that exchange was made?

A. Two and a quarter shares of Central Kentucky Natural Gas Company stock exchanged for one share of Columbia Gas and Electric Company stock.

Q. The rate was figured out at $43 per share for the Central Kentucky Natural Gas Company stock?

A. I don't know that; I have never seen anything to that effect except that exchange that I have just mentioned.

Q. And what time was that exchange made, if you know?

A. I don't know that.

Q. It was shortly after the purchase and sale of that franchise at Lexington, wasn't it?

A. It was subsequent to that.

Q. And at a time when the earnings of the Central Kentucky Natural Gas Company were open for lawful ascertainment by this body?

A. Yes; I don't believe there was any hearing had, but they must have had knowledge that this hearing was coming before it.

Q. And upon the assumption that a fair rate would be had before this body?

A. Of course I can't assume what they assume.

Q. The par value of their stock was $25; upon my assumption that it was exchanged upon a basis of $43, that would be upon a par basis of about $173 on the Hundred, [fol. 267] would it not?

A. Your computation is correct.

Q. And as a result of it then the $1,500,000 of capital stock of the Central Kentucky Natural Gas Co. would make a purchase price that the Columbia Gas & Electric Company paid to the Central Kentucky Natural Gas Co. for all of its stock, that is of the Central Kentucky Natural Gas Company's, of $2,580,000; is that correct?

A. Your arithmetic is right.

* * * * * * *

Q. Have you in your files a balance sheet of the Central Kentucky Natural Gas Co., taken from its books as reflecting its condition on December 31, 1926 and December 31, 1927, or either or both of these years?

A. I think we have, but I can't state definitely as to that. (After looking for same.) I have before me the balance sheet as of December 31, 1927.

Q. Was that taken from the books of the Company, as you understand it?

A. That is my understanding of it.

Q. Will you please tell the Commission whether there appears upon that balance sheet any fund, however, it may be styled, which has been accumulated, as taking care of the retirement of this Company through amortization?

A. They have a reserve for renewals, replacements and depletion of $1,662,062.69, according to this balance sheet.

Q. That, of course, has been built up from earnings, or income, at least?

A. That is just a bookkeeping entry, Judge.

[fol. 268] Q. What is the purpose of it as a bookkeeping entry?

A. It is beyond me; I can't understand it either.

Q. Since it is beyond both of us, let's just theorize about it a little.

A. All right.

Q. If the Company has already provided a fund, of the $1,662,000, towards taking care of the ultimate retirement of its property, loss of its property, might we not take that as a basis and figure what that at your 3½% would amount to at the end of the next twenty years, and ascertain from it that the Company had otherwise provided for the retirement of its stock?

A. We would have to inquire whether or not the owners of the property had enjoyed a fair and reasonable return on the value of the property devoted to the service of the public during the period in which this was built up.

Q. Then when we had made that ascertainment, whatever might be left over and above this $1,662,000 should be applied at a fair and reasonable rate of compound interest towards taking care of this Company's property under your twenty year theory of this Company's ultimate destruction.

A. If the Company has earned a fair and reasonable return, and has likewise earned a sum in excess thereof which

would permit it to amortize its property, naturally I don't want them to amortize it the second time.

* * * * * * *

[fol. 269] Q. Have you any information of your own as to undeveloped supplies of natural gas in Eastern Kentucky, particularly in the Big Sandy Fields?

A. No, I am not familiar with the geology of that.

Q. And you don't undertake to say that there are supplies of gas there that will last indefinitely?

A. No, I am not prepared to say that.

Q. Of course if there were such supplies there it would destroy to a large degree the amortization theory which you set out for a period of twenty years?

A. Of course if I was convinced that there was an indefinite supply it would change my figures.

* * * * * * *

The following excerpts are from the testimony of JOHN T. KIMBALL, taken on March 14, 1928:

"I didn't take a tape line in the field and measure the pipe line. I didn't inspect a single compressing station. I didn't solicit a single quotation from any dealer in materials. I didn't interview a single dealer in materials. I didn't go to the books and records of this company. That was all done by men in our organization who reported to me."

The Central Kentucky Natural Gas Company has about 112 miles of ten inch transmission line which extends east from Lexington to Inez, near the Virginia boundary. There is a four inch line in Montgomery County which carries the gas from the main transmission line into that city where the company distributes gas to the customers in Mount Sterling. It serves Winchester, in Clark County, directly from the main line. Just west of Winchester a branch transmission six and one-fourth inch line extends north to Paris, Kentucky, where gas is sold at the city gate. Off this main line there is a branch line extending to [fol. 270] Middletown, Kentucky, belonging to a separate company, however, to which the Central Kentucky sells gas at wholesale. Westward from Lexington to Frankfort, Kentucky, is a pipe line belonging to the Frankfort

Natural Gas Company, to which company the Central Kentucky Natural Gas Company supplies gas at wholesale at Lexington.

* * * * * * *

"As property wears out, the Company is continually replacing it. It must do so in order to efficiently conduct its business. If it permitted the property to entirely wear out, it would have to go out of business. It could not supply the gas. So that, taking the property as a whole, it remains in practically the same condition from year to year, by reason of the replacements and extensions, that is, the expenditures made upon it during the year. Therefore, while we find that the property is thus and so say of today, if we came back ten years from today, through the operation of replacement and maintenance, the property would still be in practically the same condition as it was found to be today.'"

* * * * * * *

During the winter months of 1926 the company drew from the gas stored in the Menifee Field which cost them an average of 11.9¢.

* * * * * * *

On page 17 of my Exhibit 4 for Ford, Bacon & Davis is an allocation of the gas purchased to the Lexington District. It is all done in the ratio that the sales in Lexington bear to the sales in the entire system.

14. An excerpt from the testimony of W. G. von Gemminden as given on April 26, 1928:

[fol. 271] I have a degree of Bachelor of Science from Rock Hill College in Maryland. I spent several years in post graduate work at the University of Gottingen, in Germany. I have been an engineer for the construction of pipe lines for the Tidewater Oil Co. I have studied from 1903 to 1911 a condition of physical railroad properties. I worked in the Steinway Tunnels under the East River. I have been engaged in valuation work on three gas plants in New Jersey. For the Electric Bond and Share Company of New York I have made studies of the corrosive effect of water on metal alloys. I have been engaged in the con-

struction of gas and chemical plants and a superintendent of the gas manufacturing plant in Brockton, Mass. and did considerable work in installing steel and wrought-iron magnets. I have been engaged in the expert operation of gas and chemical plants and have had general supervision of the operation of plants at Meriden, Conn., Holyoke, Mass., Derby, Conn., New Haven, Conn., Brockton, Mass., and Baltimore, Md. Since 1921 I have been associated with Messrs. Ford, Bacon & Davis, engaged among other things in making valuation reports and inspected and determined for rate making purposes the deterioration in a number of gas systems..

"Time in itself is not a factor of deterioration. It has been my experience in inspecting a number of gas systems, covering the Middle West and South West, that there is a point when deterioration practically no longer becomes a factor, this point being the balance between replacement and maintenance as against the forces of deterioration. In other words, you can depreciate a single unit of an operating system, but the whole system does not in a practical depreciation meet a certain point, because maintenance offsets depreciation, or deterioration, I meant to say."

[fol. 272] 15. An excerpt from the testimony of Mr. T. J. TONKIN given at the taking of December 12th and 13th, 1928:

I am the General Manager of the Central Kentucky Natural Gas Company. About a year or so before December, 1928, the Central Kentucky Natural Gas Company abandoned its contract with the Kentucky Cities Gas Company.

On January 1, 1928 the temperature was down about zero here in Lexington.

16. A condensed excerpt from the testimony of JOHN JIRGAL, given at the taking of March 11th and 12th, 1929:

I went to the books of the Central Kentucky Natural Gas Company and to the books of the Lexington Utilities Company, and from these books I found the following, after adjusting the items of cost to the price conditions at the end of 1927, to be as follows: Total property cost of the Central Kentucky Natural Gas Company, $1,664,961.95; Total property cost of the Lexington Utilities Com-

pany, $463,757.39; Total cost of both properties, $2,101,719.24.

Embraced within the item of $1,664,961.95 was the sum of $81,987.32 additions in 1927; so to get this cost for the year 1926 we deduct this $81,987.32 from the $1,664,961.95, which leaves as the cost of the property of the Central Kentucky Natural Gas Company as of December 31, 1926 to be $1,582,974.63.

Embraced within the item of $436,757.39 as the cost of the Lexington Utilities Company's property at the end of 1927 there is included an item of $53,604.73 additions during 1927; so in order to ascertain the cost of the Lexington Utilities Company's property as of December 31, 1926 there is to be deducted the sum of $53,604.73 from the sum of $436,757.39, leaving the adjusted cost of the Lexington Utilities Company's property as of December 31, 1926 to be $383,152.66.

The result of this is that the combined cost of the prop- [fol. 273] erties on December 31, 1926 was $1,966,127.29.

The method I used was to ascertain the actual cost of the property, "the actual cost expressed in 1926 dollars rather than dollars of the purchasing power at the time the property was actually put in".

These figures manifest nothing of depreciation. They are as the property would stand today, without anything having been taken off for depreciation.

"Q. In the ascertainment of the value in your Exhibit No. 1, the ascertainment was based upon fact or theory?

A. Facts.

Q. Gotten, again, where?

A. Gotten from the records of the Company.

Q. And your bringing them down to the present day conditions was gotten from where, if I may repeat?

A. For the most part from the Company's records.

Q. From its own experience?

A. Yes sir.

Q. And the 1926 values of the properties from where?

A. From the company's experience."

17. A condensed excerpt from the testimony of E. L. Carter, given at the taking of March 11, 1929:

My name is E. L. Carter, a consulting engineer by profession, specializing in utility valuation work. I am a

graduate, Bachelor of Science, Electrical Engineer, of Purdue. I had three years in the Engineering Department of the Western Electric Company, eleven years in the Engineering Department of the Public Service Commission of Indiana, first as an assistant and finally as Chief Engineer. Since that I have been in private practice. Practically the entirety of my time in the public service work was devoted to the valuation and investigation of public utility properties. I had complete charge for the commis- [fol. 274] sion of the valuation of the Indianapolis Water Company's properties under the case which went up to the Supreme Court and is known as the Indianapolis Water Works case. I have made appraisals of practically every public utility in Indiana, gas, water, heating and otherwise. I have worked with the Interstate Commerce Commission in reviewing the valuation of the Pennsylvania and Vandalia Railroad in Indiana, Ohio and Pennsylvania.

Under retainer from the City of Lexington I made appraisals of the Central Kentucky Natural Gas Company's properties and of the Lexington Utilities Company's properties under lease by the Central Kentucky Natural Gas Company. I have made a complete appraisal of such properties, and I have filed herein a report of my appraisal. That one of the Central Kentucky Natural Gas Company made as of December 31, 1926 shows the property of that company allocated to the Lexington District thus:

	Estimated cost of reproduction as of December 31, 1926	
	Cost of reproduction	Cost of reproduction depreciated
Total physical property	$1,295,124.00	$936,015.00

My appraisal of the property of the Lexington Utilities Company devoted to the natural gas service in Lexington as of the same date runs thus:

	Estimated cost of reproduction as of December 31, 1926	
	Cost of reproduction	Cost of reproduction depreciated
Total physical property	$591,277.00	$499,209.00

These figures are taken from my Exhibits 3 and 4 before the Railroad Commission of Kentucky.

[fol. 275] My total appraisal of all the physical properties of the Central Kentucky Natural Gas Company, before applying depreciation, was $2,467,127.00, and the total cost of all the properties of the Central Kentucky Natural Gas Company as depreciated by me was $1,784,194.00. The appraisal figures and as reproduced above were of all of the properties of the Lexington Utilities Company, all of which were used in supplying Lexington.

In doing this work I was in the office of the company at Lexington. I was clear through the entire length of the pipe line from Inez to Lexington. I saw it opened and exposed in excess of sixty individual places. I saw the compressor stations. I went over parts of the gathering line. I checked each well in the Menifee field, listing the amount of pipe, drilling and the amount of miscellaneous fittings as to each well. I compared them with the original log sheets. I checked the price of drilling from the actual drilling costs in the records of the Central Kentucky Natural Gas Company at Charleston. I got the costs of tubing and casing from the suppliers of various accounts of materials. We secured from the company a map showing all of the pipe lines and collecting lines. These we checked in the field by an actual field inspection both as to size of pipe and measurements taken to verify the lengths. The labor costs reflected in my report are those gotten from the field superintendent of the Central Kentucky Natural Gas Company. I got the other rate cost from the Chesapeake & Ohio Railway Company and the rate books of other lines from Pittsburgh to the various points in this investigation. My appraisal truly reflects them. I checked the cost of buidings with the Builders' Supply House of Mount Sterling, Kentucky, the nearest point of any consequence. I obtained the quantities of the various pipes from a field survey of the physical property and from the records of [fol. 276] the original purchase and deliveries of the quantities of pipe from the book of the company.

Q. I would like to ask you whether you have so far checked over and gone over the results of your work as for you to be willing to put behind it your own judgment and your own faith as to its accuracy?

A. I think it is accurate, reasonably so within human limits.

* * * * * * *

Q. Will you please state to the commission whether as an academic fact it is possible for any man to say exactly how much a piece of pipe had depreciated?

A. It is not, no sir.

Q. So a statement in percentages of depreciation is at best a reflection of human experience and human judgment; is that correct?

A. It is and necessarily must be so.

* * * * * * *

Q. Do these items here, these figures here at the right hand side of page 5 manifest what is your best human judgment as to what is the present value of these properties after applying depreciation and considering the factors which you have named and considering the location and use of the various and sundry properties?

A. They do.

* * * * * * *

Q. Have you had occasion to review the depreciation figures of Mr. Kimball who has appeared and testified for the Central Kentucky Natural Gas Company?

[fol. 277] A. I have, yes sir.

Q. Have you figured from his testimony what his depreciation percentage is for the twenty years that these properties have been in life?

A. I have.

Q. What is his percentage of depreciation?

A. His percentage of depreciation is approximately 9%.

Q. Over all?

A. Over all, yes sir.

* * * * * *

When I was in the Menifee fields in 1928 I saw evidence in the field of considerably more than 100 places where repairs had been made for leaks and there were others yet to be made. I saw on the main line a leak stake numbered 348. Some of the repairs remained yet to be made when our investigation was being conducted. In appraising the Lexington Utilities Company's property I actively aided in and supervised the work. I saw its pipe exposed in approximately 25 places. I did the same sort of work in the investigation and appraisal of these properties as I did those of the Central Kentucky Natural Gas Company.

In addition to the cost of the pipe and the cost of the labor and the cost of the freight and the cost of the sundry items that go to make up the physical items of all the properties, I have added for the Central Kentucky Natural Gas Company an additional sum of $319,603.00, and for the Lexington Utilities Company an additional sum of $77,123.00. These items are what are called "Undistributed Capital Expenditures" by which I mean such costs as are incurred in the actual building of the property which are not taken care of in the unit prices applied to the various items of inventory. It embraces an allowance of [fol. 278] 15% which has been made on the total of all items inclusive of material and supplies to cover engineering, omissions in taking inventory, contingencies, administration, legal expenses, insurance and taxes and interest during construction from actual construction experience and from a study of various jobs, it has been found that an allowance of 15% is a reasonable allowance to take care of costs of this character.

I found that the gas sales in Lexington were 56.55% of all the sales of the company.

The total number of meters in use as of December 31, 1926 in the Lexington District was 10,101.

Since I made my appraisal the Central Kentucky Natural Gas Company has commenced to supply the Cities of Georgetown and Cynthiana, Kentucky. They are supplying these towns from their already existing lines. The effect of this is to decrease the value of the properties allocable to the use in the Lexington District because the lines would be used for other purposes with the same factor of use in Lexington.

In the progress of this work I visited the Big Sandy Valley in Kentucky, Paintsville and Prestonburg in that state and Huntington and Charleston in West Virginia. I visited the gas trade generally and inquired to ascertain the wholesale price of gas. I found it to range at the well from 10¢ to 13¢.

In making my calculation as set up in Exhibits 7 and 8 I took my "1926 operating expense and revenues" from Exhibit #4, filed by Ford, Bacon and Davis. In other words, I adopted for the purpose of this calculation Messrs. Ford, Bacon and Davis' manifestation of expenses. In the gas purchase costs in this computation I have included 750,-

000,000 cubic feet a year from the Petroleum Exploration Company at forty cents a thousand, and the balance of it at twelve and one half cents, all allocated them on the percentage of 56.55 basis as named above for Lexington.
[fol. 279] This calculation was made at the request of the City and its attorneys.

In making this computation I took Mr. Jirgal's historical cost of reproduction and depreciated it to the Carter condition and allocated to the Lexington District as above. I also took Mr. Jirgal's cost of reproduction and depreciated it to the Kimball condition. In my Exhibit #8 I followed the same method except that I treated the properties of the Central Kentucky Natural Gas Company allocable to Lexington and those of the Lexington Utilities Company as one entire property. I have made these figures myself and put myself behind them.

Q. Mr. Carter, in order that we may understand just what has been presented to the Commission, will you state whether or not you have made an appraisal of prices and conditions and information for the year 1926 or some other year?

A. The inventory in so far as we were able to ascertain was made for December 31, 1926. The unit prices are as of that particular date for labor and material.

. . . . . .

Q. I was considering the figure to which you apply your 12½¢. The amount of gas to which you apply the 12½¢ excludes the "Pet-Ex." gas, doesn't it?

A. Yes.

Q. Now in using that figure, what value have you placed upon existing contracts of this company by the supplying of gas by various independent purchasers?
[fol. 280] A. I have taken in those computations all gas excepting the 750,000 M. cu. ft. purchased at 40¢ per M. cu. ft., at 12½¢ per M. cu. ft.

. . . . . .

Examination by Robt. H. Winn, Esq.:

Q. Mr. Carter, upon your cross-examination you were asked about why you adopted the 12½¢ per thousand as the

purchase price of gas in your per cent of return calculations to which your exhibits 7, 8 and 10 pertain now as revised. You were led to say and did say that you made use of that figure at my request. And then your attention was directed elsewhere. I desire to ask you whether or not before utilizing that figure, there had been discussion between you and me as to the propriety of its use?

A. There was a considerable amount of discussion.

Q. I will ask you now, please, to turn to Kimball Exhibit No. 4, page 14. (The witness does so.) That sheet purports to be a summing up of gas purchases for the five years immediately preceding December 31, 1926, the date to which our inquiry was addressed. That exhibit further purports to give the amounts of gas purchased, the prices at which purchased, and the quantities purchased at the several prices. I beg to ask whether or not we have made a calculation and before we utilized the 12½¢, whether we did make a calculation resulting in an average over all for the cost of that gas, excluding the United Fuel Supply.

[fol. 281] A. Yes, sir; we did.

Q. What was the result per thousand as demonstrated by Mr. Kimball's exhibit that the gas purchased for the five years before December 31, 1926, excluding the United Fuel, cost the company, the Central Kentucky Natural Gas Company, per thousand?

A. A fraction over 13 cents.

Q. 13.2 cents to be exact?

A. I think that is the exact figure.

Q. Were you, before the 12½¢ was arrived at and at least in that calculation, requested to make any independent examination of your own in the gas fields of Eastern Kentucky as to the selling price?

A. I was; yes, sir.

Q. And did you make that examination?

A. I did.

Q. You testified, I believe, to that on your main examination?

A. I think I did; yes, sir.

Q. And the result was?

A. The price as I recall was 10 to 12 cents.

Q. Since that time, I believe, you have had, as well the benefit of whatever Mr. Beckner may have said upon the subject?

A. I have.

Q. But didn't have that at the time we took the 12½ cents?

A. That is correct.

Q. And is it upon these calculations and investigations, rather than upon any arbitrary requests upon my part that you utilize the 12½ cents as a fair cost price of the gas?

A. That is correct.

* * * * * * *

[fol. 282] In my reproduction valuation I have included these items from Mr. Kimball's set-up:

Going concern value	$171,712.00
Cost of obtaining new franchises	36,705.00
Working cash capital	44,256.00
Total	$252,673.00

My total appraisal $1,189.00 (round figures) for the Lexington properties is made up of these items:

Estimated allowance for materials purchase price, plus the cost of freight, cartage, and labor of put-ing the physical property in the ground	$816,033.00
Kimball's intangibles, as above	252,673.00
Fifteen per cent on the first item for "Undistributed Capital Expenditures"	120,783.00
Total over all	$1,189,489.00

* * * * * * *

18. The testimony of W. J. Hightower, condensed and in substance, is as follows:

My name is W. J. Hightower. I live at Charleston, West Virginia. I am the Assistant Treasurer and Assistant Secretary of the Central Kentucky Natural Gas Company and hold the like position with some ten other companies which are a part of the Columbia Gas and Electric Corporation, known as the Charleston group. I am the chief ac-

counting officer for the Central Kentucky Natural Gas Company. Before I came into the organization as a part of the Columbia interest, I had been identified with the Columbia interest, and as a result of the Columbia's purchase of the Central Kentucky Natural Gas Company I became identified with the Central Kentucky Natural Gas Company as of December 1, 1927. Referring to the depreciation item of $1,456,400.63 shown as an asset in T. J. [fol. 283] Tonkin Exhibit Balance Sheet 1926 and to an item of "Renewals, Replacements and Depletions $1,662,-062.69" shown as a liability of the Central Kentucky Natural Gas Company as of December 31, 1927, I explain that "in figuring up depreciation and depletion it is simply a bookkeeping entry and does not necessarily mean that there was actually that much depreciation in connection with the property or depletion. The amount is usually determined by the income tax report. I think it is common practice to show this account on the liability side of the sheet. The old company happened to show it on the asset side of the sheet."

19. So much of the Mount Sterling, Kentucky, Franchise Contract, dated July 13, 1927, filed herein as "Exhibit Mount Sterling" as is in words and figures as follows:

EXCERPT FROM MOUNT STERLING FRANCHISE CONTRACT

"Section 23. The company agrees, and such agreement is a condition upon which the franchise is granted, that it will begin or cause to have begun within three months after this franchise becomes effective the construction of, and have in operation or cause to be operated within twelve months thereafter, a main line or lines of pipe from adequate sources of supply of natural gas in the state of Kentucky or in the state of West Virginia so connected as to supply natural gas in the distributing system in the City of Mount Sterling; said main line or lines shall be of sufficient capacity and shall be provided with sufficient and adequate compressor stations and other necessary equipment to supply such quantities of natural gas as may be required to enable the company to comply with the terms of this franchise. Provided, however, that if the company shall have a ten-inch transmission pipe line which is being used for transporting natural gas from the eastern part

of the state of Kentucky to the City of Mt. Sterling, then the company shall begin or cause to have begun within six months after this franchise becomes effective the construction of, or have in operation or cause to be operated [fol. 284] within nine months thereafter an additional main line or additional lines of pipe from adequate sources of supply of natural gas in the state of Kentucky or in the state of West Virginia so connected as to supply natural gas in the distributing system in the City of Mt. Sterling; said additional main line or lines shall be of such capacity and shall be provided with sufficient and adequate compressor stations and other equipment to supply such additional quantities of natural gas as may be required to enable the company to comply with the terms of this franchise. "If the construction and operation of the additional line of pipe as herein provided be delayed by cause or causes beyond the control of the company, such delay shall not be considered in estimating the time within which the same shall be constructed and put in operation. It is especially reserved and provided that should the company fail to have said two pipe lines constructed and supplying gas as herein provided, the city may, upon six months' written notice to the company, declare this contract at an end."

List of Exhibits Filed Herewith

Gas purchase contract between the Central Kentucky Natural Gas Company and the United Fuel Gas Company, being gas purchase contract No. 20 of the record herein.

Gas purchase contract between the Central Kentucky Natural Gas Company and the Kentucky Cities Gas Company, being gas purchase contract No. 18 of the record herein.

Gas purchase contract between the Central Kentucky Natural Gas Company and the Bed Rock Petroleum Company, being gas purchase contract No. 25 of the record herein.

Gas purchase contract between the Central Kentucky Natural Gas Company and the Hillsdale Gas Company, being gas purchase contract No. 24 of the record herein. [fols. 285-287] Gas purchase contract between the Central Kentucky Natural Gas Company and Lewis Vincent, being gas contract No. 16 of the record herein.

Lease-hold contract between the Central Kentucky Natural Gas Company and Lexington Gas Company (now Lexington Utilities Company), being contract No. 21 of the record herein.

A map filed with the deposition of D. C. Hunter as "Hunter No. 2."

Wherefore the Appellees pray that the above additions to the evidence as suggested and condensed by the Appellant may be allowed, settled and approved by the above entitled Court as a proper and true addition to the evidence required and demanded by the statement of the Appellant and as a proper and essential part of the evidence and record in this case to be presented on appeal therein to the Supreme Court of the United States; and further that this Court and the judges thereof, as is provided in Rule 10, Sub-section 4 of the Supreme Court of the United States, make an order directing the transmission, as a part of the record on said appeal, of the map "D. C. Hunter No. 2" hereinbefore referred to and as well for the safe keeping, transporting and return of the said paper.

Dated January 31, 1933.

Robt. H. Winn, C. W. Harbison, Bailey P. Wooson, S. H. Brown, Attorneys for Appellees.

Service of the foregoing proposed amendments to the record and statement of the evidence as made by the Appellees to be used on the appeal of this case to the Supreme Court of the United States and the receipt of a copy thereof this first day of February, 1933, as hereby admitted and acknowledged.

D. L. Hazelrigg, Henry T. Duncan, Attorneys for Central Kentucky Natural Gas Co.

[fol. 288] EXHIBIT TO PROPOSED AMENDMENTS

"This agreement, made and entered into this 1st day of November, A. D. 1912, by and between the United Fuel Gas Company, Incorporated, a West Virginia corporation, hereinafter called the "United Company", party of the first part, and the Central Kentucky Natural Gas Company, Incorporated, a Kentucky corporation, hereinafter

called the "Kentucky Company", party of the second part,

Witnesseth: Whereas, the United Company is the owner of natural gas wells, gas rights and leases for gas purposes, and gas purchasing contracts in the states of West Virginia and Kentucky, and is the owner of a pipe line extending from its natural gas properties through or near the village of Inez, on the waters of Rock Castle Creek in Martin County, Kentucky, and

Whereas, the Kentucky Company is engaged in the business of producing and distributing natural gas in various cities and towns in the State of Kentucky where it is the owner of franchise, and desires to supplement its supply of natural gas by the construction of a ten inch pipe line to the said village of Inez for the purpose of purchasing gas from the United Company;

Now therefore, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto have agreed and do hereby agree as follows:

* * * * * * *

[fol. 289] Third. The United Company undertakes and agrees to sell and deliver to the Kentucky Company and the Kentucky Company undertakes and agrees to purchase and take from the United Company during each year (commencing December 1st and terminating November 30th) of the existence of this contract, natural gas of the volume of not less than 720,000,000 cubic feet, the exact amount deliverable each year to be determined in the manner hereinafter set forth: provided, however, that the United Company shall not be obligated to sell and deliver to the Kentucky Company gas in excess of the amount which can be delivered at Inez Station under a pressure of 300 pounds to the square inch in the initial or Inez end of the said 10 inch line of the Kentucky Company, as now about to be constructed from Menifee County, nor in excess of the amount [fols. 290–292] of gas which the United Company may have available for delivery as limited and defined in the Fifteenth article of this agreement.

* * * * * * *

[fol. 293] Eighth. The Kentucky Company undertakes and agrees that it will pay to the United Company for the natural gas sold and delivered to it by the United Company hereunder, at the following prices:

For all natural gas sold and delivered to it up to and including November 30th, 1913, 9 cents per thousand cubic feet;

From December 1st, 1913, to and including November 30th, 1914, 10 cents per thousand cubic feet;

From December 1st, 1914, to and including November 30th, 1915, 11 cents per thousand cubic feet;

[fols. 294–296] From December 1st, 1915, to and including November 30th, 1915, 12 cents per thousand cubic feet;

From December 1st, 1916, to and including November 30th, 1917, 13 cents per thousand cubic feet;

From December 1st, 1917, to and including November 30th, 1918, 14 cents per thousand cubic feet;

From December 1st, 1918, to and including November 30th, 1922, 15 cents per thousand cubic feet;

And for all natural gas sold and delivered to it from and after November 30th, 1922, during the existence of this contract, a price equivalent to 50 per cent of the average domestic rate in all of the distributing systems of the Kentucky Company, which price shall not in any event be less than 17½ cents per thousand cubic feet, net, to the United Company; such average domestic rate shall be ascertained each month by dividing the total charges of the Kentucky Company for all gas sold during the month for domestic purposes including minimum rate charges for domestic natural gas service but excluding premium charges against consumers delinquent in payments, by the total amount of natural gas sold by the Kentucky Company during the same month for domestic purposes; and in case the Kentucky Company is selling gas to any other company which in turn distributes the gas to the domestic consumer, no account of the rate at which such gas is sold in wholesale quantities by the Kentucky Company or the volume of gas so sold, shall be taken in ascertaining such average domestic rate, but the charges of such distributing company to consumers using gas for domestic purposes and the amount of gas sold by such distributing company for demestic purposes shall be taken into the computations in the same respect as if such gas was being distributed and charged for by the Kentucky Company directly to the domestic consumer.

* * * * * * *

[fols. 297–299] Unless previously terminated pursuant to the provisions herein contained or by mutual consent of the parties hereto, this contract shall continue for the term of twenty years from its date and so long thereafter as the United Company produces gas in marketable quantities from its gas properties in West Virginia and Kentucky.

* * * * * * *

[fols. 300–308] In witness whereof the parties hereto have hereunto caused their corporate names to be signed by their respective Presidents and their respective seals to be hereunto affixed by their respective Secretaries the day and year first above written.

United Fuel Gas Company (Incorporated), by F. W. Crawford, President. Attest: H. C. Reeser, Secretary. Central Kentucky Natural Gas Company (Incorporated), by Joseph Seep, President. Attest: Robt. S. Hampton, Secretary.

[fols. 309–320] EXHIBIT TO PROPOSED AMENDMENTS

July 9th, 1927.

To the Kentucky Cities Gas Company, % B. C. Tynes, President, Robson & Pritchard Bldg., Huntington, West Virginia:

You are hereby notified that the Central Kentucky Natural Gas Company hereby elects to cancel its contract with you dated July 23rd, 1920, as provided in Section 18 thereof, said cancellation to take effect six months from this date as therein provided.

Central Kentucky Natural Gas Company, (Original Signed) by John Tonkin, President.

[fols. 321 & 322] EXHIBIT TO PROPOSED AMENDMENTS

June 29th, 1922.

"Mr. G. C. Davison, Pres. Bed Rock Petroleum Co., New London, Conn.

DEAR SIR: In line with our understanding when I had the pleasure of meeting you in New York last March, we will pay your company thirty (30%) percent of our average

domestic rates in the cities of Lexington, Winchester and Mount Sterling, beginning September 1st, 1922. Our present rate in each of the cities mentioned is forty cents per thousand cubic feet which will make the rate to your company twelve (12¢) cents per thousand cubic feet.

We are filing a copy of this letter with the contract and suggest that you do likewise.

Very truly yours, (Original Signed) W. O. Walker, Vice President Central Kentucky Natural Gas Company.

WOW:NC.

[fol. 323] This contract, made and entered into this 20th day of November, A. D. 1918, by and between the Red Rock Oil Company, a Kentucky corporation, party of the first part, and the Central Kentucky Natural Gas Company, a corporation organized under the laws of the State of Kentucky, party of the second part,

Witnesseth:

* * * * * * *

[fols. 324 & 325] Second. The party of the second part agrees to * * * take and pay for all the natural gas in and underlying said lands, not exceeding five million cubic feet per day during the six winter months, at the rate of eight (8) cents per thousand cubic feet, * * * and second party agrees to take and pay for during the six summer months at said rate of eight cents per thousand cubic feet. * * *

* * * * * * *

[fols. 326-328] Fifth. When the supply of natural gas available for delivery hereunder so diminishes from natural causes such as exhaustion and encroachment of water that the party of the first part is unable to deliver an average of five hundred thousand cubic feet per day during any one of the said winter months, the party of the second part may at its option, upon two months' written notice to the party of the first part, cancel this contract.

* * * * * * *

[fols. 329-334] In witness whereof the parties hereto have hereunto caused their corporate seals to be affixed and the same to be attested by their presidents and secretaries on the day and year first above written.

Red Rock Oil Company (Incorporated), by G. C. Davison, President. Attest: F. L. Braw, Asst. Secretary. Central Kentucky Natural Gas Co. (Incorporated), by John Tonkin, President. Attest: Robt. S. Hampton, Secretary."

[fols. 335-337] Exhibit to Proposed Amendments

"Agreement

This agreement, made and entered into the twenty fourth day of January, A. D. 1924, by and between the Hillsdale Gas Company, a corporation under the laws of the State of Delaware, of Covington, Kentucky, party of the first part, and Central Kentucky Natural Gas Company, Incorporated, a Kentucky corporation, party of the second part,

Witnesseth:

* * * * * * *

[fols. 338 & 339] Sixth. The party of the first part undertakes and agrees that it will sell to the party of the second part so soon as said connecting line is completed, and the party of the second part undertakes and agrees to purchase and take from the party of the first part during each year of the existence of this contract, and beginning with the date of the completion of said connecting line and compressor plant, natural gas of the volume of not less than seven hundred and twenty million (720,000,000) cubic feet.

* * * * * * *

[fols. 340 & 341] Tenth. The party of the second part undertakes and agrees that from the time of the commencement of deliveries it will pay to the party of the first part for the natural gas sold and delivered to it by the party of the first part, the rate or price of twenty (20) cents per thousand cubic feet, and that said rate shall be increased by an amount equivalent to thirty-three and one-third ($33\frac{1}{3}$) per cent of any increase in the net domestic rate

which the party of the second part may hereafter obtain in the City of Lexington, Kentucky.

* * * * * * *

[fols. 342 & 343] Sixteenth. In case the supply of gas available for delivery hereunder to the party of the second part so diminishes that the party of the first part is unable to deliver five hundred thousand (500,000) cubic feet on the average per day during the winter period, namely, from November to April, inclusive, either party shall have the right upon six months' written notice to cancel this contract.

* * * * * * *

[fols. 344 & 345] Nineteenth. Unless previously terminated pursuant to the provisions herein contained or by mutual consent of the parties hereto, this contract shall continue for the term of ten (10) years from the date of the completion of said connecting line, measuring station and compressor plant.

* * * * * * *

In witness whereof the parties hereto have hereunto caused their corporate names to be signed by their respective Presidents and their respective seals to be hereunto affixed by their respective secretaries the day and year first above written, by Central Kentucky Natural Gas Company (Incorporated) and on February 6, 1924, by the Hillsdale Gas Company.

Hillsdale Gas Company, by (Sgd.) Louis J. Dolle, President. Attest: (Sgd.) A. C. Cronin, Secretary. Central Kentucky Natural Gas Company (Incorporated), by (Sgd.) John Tonkin, President. Attest: (Sgd.) Norman E. Clay, Secretary.

[fols. 346–348] Exhibit to Proposed Amendments

"This Agreement, made and entered into this 20th day of April, A. D. 1925, by and between Lewis Vincent, of Pittsburgh, Pennsylvania, party of the first part, and Cen-

tral Kentucky Natural Gas Company, Incorporated, a Kentucky corporation, party of the second part,

Witnesseth:

. . . . . .

[fol. 349] Eighth. The party of the second part agrees to purchase gas from the party of the first part under the terms and conditions hereinbefore specified until such time as in the judgment of the party of the second part it is no longer profitable to maintain and operate its said six and five eighths inch pipe line. This contract shall terminate when second party shall cease to operate its said six and five eighths inch pipe line after which no further liabilities shall accrue and either party may reclaim its property used for the purpose of this contract.

. . . . . .

[fols. 350-359] Witness the signature and seal of the party of the first part and the common and corporate seal of the party of the second part duly affixed and attested by its proper officers the day and year first above written.

Lewis Vincent. (Seal.) Witness: C. B. Vice. Central Kentucky Natural Gas Co. (Incorporated). W. O. Walker, Vice-President. Attest: Norman E. Clay, Asst. Secretary."

[fol. 360] In United States District Court

[Title omitted]

Order Extending Time—Filed Jan. 27, 1933

This day came the parties hereto and filed their stipulation extending time to file the transcript of record on appeal, and the Court being advised, and for satisfactory reasons appearing to the Court, the time for filing the record in this case in the Supreme Court of the United States pursuant to the appeal sued out, is extended until the 28th day of February, 1933.

Chas. H. Moorman, Smith Hickenlooper, Chas. I. Dawson, Judge.

A Copy.

S. W. Stacey, Clerk, by ——— ———, D. C. (Seal U. S. Dist. Court, East. Dist. of N. Y., U. S. of America.)

[fol. 360-a] [File endorsement omitted.]

[fol. 361] In United States District Court

[Title omitted]

Order Extending Time to File Transcript of Record—Filed Feb. 27, 1933

Good cause appearing therefor, it is hereby Ordered that the time within which to prepare the transcript of record on appeal and to docket the appeal of plaintiff in the above entitled suit in the Supreme Court of the United States, be, and the same is hereby enlarged to and including the 15th day of March, 1933.

Dated February 18, 1933.

Chas. H. Moorman, United States Circuit Judge.
Smith Hickenlooper, United States Circuit Judge.
R. M. N. Emory, District Judge.

[fol. 361-a] [File endorsement omitted.]

[fol. 362] Supreme Court of the United States

Statement of Points to be Relied upon and Designation of Parts of Record to be Printed—Filed March 18, 1933

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court, in this case, are as follows:

Point I

The Court committed error in attempting to determine the validity of the Commission Rate of 45 cents as of December 31, 1926, as of which date there was no con-

troversy as to rates, and in refusing to determine the validity of such rate under the terms and conditions of the franchise contract (under which alone the rate controversy arose), and in refusing to find said rate invalid [fol. 363] and confiscatory as of the dates and period to which the Railroad Commission made said rate to apply, to-wit, the date of the franchise contract (February 25, 1927), the date of the Commission order (October 9, 1929), and the period between said dates. (Errors III, IX and X.)

Point II

The Court committed error in failing and refusing to adopt and apply the value of the rate base determined by it (as of December 31, 1926) to the contract date (February 25, 1927), and as constituting the rate base value for all purposes of this case. (Errors III, IV and V.)

Point III

The Court committed error in failing and refusing to find the following facts, to-wit:

(1) That prior to and at the time of the franchise contract, plaintiff owned and operated a ten inch transmission pipe line for transporting natural gas from the eastern part of the State of Kentucky to the City of Lexington;

(2) That said pipe line was not of sufficient capacity to enable the Company to supply natural gas in sufficient quantities to enable it to comply with the terms of the franchise contract as required by Section 23 of said contract;

(3) That by Section 23 of said contract it was provided that if the company (purchasing the franchise) should have a ten inch line, then said company should within six months begin the construction and have in operation within nine months thereafter, an additional main line of pipe to adequate sources of supply in the State of Kentucky or the State of West Virginia;

(4) That under Section 22 of said contract it was provided that after the Company was furnishing gas through [fol. 364] two pipe lines, as required under the terms of

Section 23, the Company should furnish gas at all times at a uniform and adequate pressure at the outlet of each customer's meter;

(5) That by Section 4(E) of said contract it was provided that the Company should collect a temporary rate of 50 cents (impounding 10 cents) until it was furnishing gas through two pipe lines as required by Section 23, and that after said Company was furnishing gas through two pipe lines, it should collect a temporary rate of 60 cents (impounding 10 cents) until the final fixation of reasonable rates;

(6) That in compliance with the obligation imposed by said Section 23, the Company entered into a contract with Petroleum Exploration, a corporation then owning an adequate source of supply of natural gas in Owsley and Clay Counties in Eastern Kentucky, whereby it was agreed that said Petroleum Exploration would construct such additional line of pipe from the City of Lexington to said source of supply, and whereby it was further agreed that said Petroleum Exploration would furnish and deliver to the Company at Lexington and the Company agreed to purchase a minimum of 750,000,000 cubic feet per annum, and to pay therefor 40 cents per M. c. f.;

(7) That said additional pipe line was completed and gas begun to be delivered through the same in November, 1927, and the agreed temporary rate of 60 cents went into effect on December 1, 1927;

(8) That the making of said contract with said Petroleum Exploration and the completion of said additional pipe line and the delivery of gas through the same, was accepted by the City of Lexington as a performance of the obligation imposed by said Section 23;

[fol. 365] (9) That the cost of said additional supply of gas became a fixed part of the Company's annual operating expenses from and after December 1, 1927. (Error VII.)

Point IV

The Court committed error in failing and refusing to find as a matter of law, that from and after the date the

plaintiff was furnishing gas through the second pipe line (December 1, 1927), as required by Section 23 of the franchise contract, the cost of said additional gas should be included in any estimate of the plaintiff's operating expenses in determining the question of just and reasonable rates for the plaintiff's gas service. (Error XI.)

Point V

The Court committed error in failing and refusing to find that the schedule of rates promulgated by the plaintiff on February 26, 1927, in compliance with Section 4(B) of the franchise contract, were not in excess of just and reasonable rates and that any lower rates would be unjust and unreasonable and confiscatory. (Error VIII.)

Point VI

The Court committed error in failing and refusing to decide as a judicial question submitted to it under the franchise contract agreement, what rates and charges would be just and reasonable under the terms and conditions of the franchise contract. (Errors VI and XIV.)

Point VII

The Court committed error in finding that a 50 cent rate for gas would as for a normal year produce net income sufficient to yield a seven per cent return on the rate base fixed by it. (Error XII.)

[fol. 366]

Point VIII

The Court committed error in finding that a seven per cent return is fair and reasonable for plaintiff, and in refusing to find in accordance with the evidence that plaintiff is entitled to earn a ten per cent return by reason of the nature and extra hazard of the natural gas business. (Error XIII.)

Point IX

The Court committed error in failing and refusing to find that plaintiff has the right under the law and the express terms of the franchise contract to fix its own rates and charges for its gas service, and that plaintiff has the

contract right to charge and collect a minimum rate, or service charge, and to charge lower rates for larger quantities of gas and higher rates for smaller quantities of gas subject only to the limitation that such rates and charges shall not be in excess of what is just and reasonable. (Error IV.)

Point X

The Court committed error in failing and refusing to find the facts of this cause specially and to state separately its conclusions of law thereon, and to enter the same of record. (Errors I and II.)

Point XI

The Court committed error in refusing to grant a permanent injunction against the enforcement of the Commission Rate of 45 cents. (Error XVII.)

Point XII

The Court committed error in ordering that plaintiff pay the costs incurred in this action contrary to the express [fol. 367] agreement contained in Section 35 of the franchise contract that all court costs should be paid equally by the plaintiff and the City of Lexington.

Henry T. Duncan, D. L. Hazelrigg, Chester J. Gerkin, Attorneys for Appellant.

Service accepted this March 18, 1933.

Robt. H. Winn, C. M. Harbison, Attorneys for Appellees.

[fol. 368] Designation of the Portions of the Record and Statement of the Evidence to be Printed

March 11, 1933.

To Charles Elmore Cropley, Clerk of United States Supreme Court, Washington, D. C.:

For the purpose of complying with the Rules of the Supreme Court of the United States, and particularly Rule 13, paragraph 9, you are hereby advised that the parts of the record deemed necessary for the consideration of the appeal herein and which should be printed, are hereinafter designated and you are requested to print only the portions of the record so designated, to-wit:

[fol. 369] The Court Record

Portions to be printed	Transcript pages
1. Bill of Complaint, filed October 19, 1929	1- 38
2. The franchise ordinance filed with the Bill of Complaint and designated as Exhibit "A," omitting therefrom the following sections of said ordinance, Section 3 and Sections 8 to 21 inclusive; the portion of Section 22 beginning with the words: "The Company shall provide" (Transcript p. 44), and ending with the words: "at locations as directed." (Transcript p. 45), Section 24 to Section 29, inclusive, Sections 32 to 34 inclusive. Section 36. The portion of Article II beginning with the words: "Each bidder shall be required," (Transcript p. 48) and ending with the words "in hands of the Mayor." Article V, Article VII.	
3. Motion for Interlocutory Injunction and for Temporary Restraining Order, Filed October 9, 1929	50- 51
4. Temporary Restraining Order, entered October 19, 1929	52- 54
5. Motion by defendants to dismiss the Bill of Complaint, filed November 8, 1929	55- 56
6. Answer, filed November 14, 1929	56- 72
7. Notice to the Governor of Kentucky, filed December 7, 1929	73
8. Amended Bill of Complaint, filed December 7, 1929	73- 76
9. Opinion, filed January 29, 1930	77- 91
10. Order entered March 8, 1930 (Omitting therefrom paragraph 13)	91- 94
11. Order entered March 24, 1930 (Omitting therefrom paragraphs 1 and 3)	97- 98
12. Order entered July 20, 1930	98-103
13. Opinion filed July 11, 1932	106-115
14. Agreed order entered August 5, 1932	123

[fol. 370]

Portions to be printed	Transcript pages
15. Motion to find facts specially and state separately conclusions of law thereon, filed August 13, 1932. (Omitting therefrom under the heading "Findings of Fact" the following portions thereof, to-wit: Paragraphs 1 and all sub-paragraphs; Paragraphs 2, 5 and 6 and all sub-paragraphs; and also omitting under the heading "Conclusions of Law" the following portions thereof, to-wit: Paragraphs 3, 4 and 9	124-134
16. Order entered August 13, 1932	135
17. Letter to Clerk, filed September 22, 1932	135-136
18. Order overruling motion to find specially the facts and state conclusions of law, filed September 22, 1932	136
19. Decree entered September 22, 1932	137-140
20. Order Filing Petition for Rehearing	140
21. Order overruling Petition for Rehearing entered November 22, 1932	142
22. Order entered December 20, 1932, filing petition for appeal	142-143
23. Petition for Appeal, filed December 20, 1932	143-144
24. Assignment of Errors, filed December 20, 1932	144-150
25. Order allowing appeal entered December 20, 1932	151
26. Citation of Appeal, entered December 22, 1932	154
27. Statement of Jurisdiction, filed December 20, 1932	155-158
28. Notice filed December 20, 1932	159-160

Statement of Evidence

The following portions of the "Condensed Statement of Pleadings Before Railroad Commission of Kentucky, and Evidence Essential to Decision of Questions Presented on Appeal" are deemed necessary for the consideration of the [fol. 371] points on which appellant intends to rely, and you will therefore please have printed such portions thereof and such portions of the Exhibits filed therewith as hereinafter designated, to-wit:

Portions to be printed

	Transcript pages
The entire Condensed Statement filed by the appellant, except the following portions thereof which should be omitted	161-233
(1) Beginning with the words "in accordance with," (Transcript p. 161), and ending at the bottom of page 162	161-162
(2) Paragraphs 5 and 6, and the words "being the order complained of herein" at the end of paragraph 7	164
(3) Beginning with the words "Company Exhibit No. 9," and ending with the words, "Consumed per month." (Transcript p. 166)	166
(4) Beginning with the words "Many of the Contracts" (Transcript page 167), ending with the words "basis of these contracts" (Transcript page 168)	167-168
(5) "Counsel: That is under letters "M. c. f." "The Witness: "That is right." (Transcript p. 172)	172
(6) Beginning with the word "Counsel" near top Transcript page 174, and ending with the words "held in trust." (Transcript p. 175)	174-175
(7) Beginning with the words "In addition to the figures" (Transcript p. 175) and ending with the words: "Field and main line expenses." (Transcript p. 176)	175-176
(8) Beginning with the words: "Mr. Duncan" near top of Transcript page 183, and ending with the words "above that figure is 16.6¢," same page	183
(9) "Mr. Duncan: That was in 1926?" The Witness: "Yes." (Transcript p. 183)	183
(10) "Mr. Walker told me when he was alive that they failed to compute the amount of gas withdrawn from the field and used in those compressors." (Transcript p. 184)	184

[fol. 372]

Transcript pages

(11) Beginning with the words: "Mr. Duncan" (Transcript page 184) and ending with the words "it is a very novel situation." (Transcript p. 186) 184-186

(12) Beginning with the words "The next statement" (Transcript p. 187) and ending with the words: "the entire Company," (Transcript p. 190) 187-190

(13) The portion beginning with the words "which is entitled" (Transcript p. 190) and ending with the words: "with the Commission," (Transcript p. 190) 190

(14) "Mr. Duncan: None of that loss is included in the Lexington District?"

"The Witness: That is correct." (Transcript p. 191) 191

(15) The words: "monthly—I will retract that: The number of bills sent out by the Company." (Transcript p. 192) 192

(16) The words: "I believe in that last statement which I read there is a dollar sign in front of it which should be eliminated." (Transcript p. 195) 195

(17) The words: "Also in the total of column 12 there is a dollar sign which should be eliminated, that being thousand cubic feet." (Transcript p. 196) 196

(18) The portion: "I expect the Commission is pretty tired of this. The statements that follow speak for themselves, but if you desire, I would be glad to go into the details." (Transcript p. 196) 196

(19) The question and answer portion beginning with the words: "Q. Mr. Kimball," and ending with the words: "Of this record." (Transcript p. 199) 199

(20) "Mr. Duncan: Identify that as Company Exhibit No. 8." (Transcript p. 200) 200

(21) The entire portion under the heading "Hearing on December 12, 1928," (Transcript p. 206) 206

[fol. 373]

Portions to be printed	Transcript pages
(22) The portion beginning with the words: "We desire as well" (Transcript p. 208) and ending with the words: "sources of supply." (Transcript p. 209)	208-209
(23) The portion beginning with the words: "Judge Winn" (Transcript p. 210) and ending with the words "has no objection." (Transcript p. 212)	210-212
(24) The portion beginning with the words: "By stipulation and agreement," (Transcript p. 224) and ending with the words: "on that basis." (Transcript p. 224)	224
(25) The portion beginning with the words: "Objection by counsel for complainants," and ending with the words: "Exception saved by counsel for complainants." (Transcript p. 231)	231
(26) Also omitting pages 7, 8, 9, 10, 11, 12 and 13 of "Company Exhibit 4."	
(27) Also omitting Company Exhibit No. 9.	
(28) Also omitting Carter Exhibit No. 7.	
(29) Also omitting Carter Exhibit No. 8.	
(30) Also omitting Carter Exhibit No. 10.	
(31) Also omitting the entire portion of the transcript under the heading "Amendments Proposed by the Appellees to the Appellant's Statement of the Evidence for the Appeal," and all Exhibits filed therewith by appellees, beginning on P. 234 of Transcript and ending on page 350 of Transcript	234-350

Please omit all repetitions of title, and note in the printed record the omissions of the various instruments mentioned in the præcipe herein certified to the Clerk of the Supreme Court.

Henry T. Duncan, D. L. Hazelrigg, Chester J. Gerkin, Attorneys for Central Kentucky Natural Gas Company, Appellant.

Service of the foregoing directions to the Clerk of the Supreme Court of the United States designating the portions of the record to be printed, is hereby accepted on behalf of the Appellees, this March 18, 1933.

Robt. H. Winn, O. W. Harbison, Attorneys for Appellees.

[fol. 374] [File endorsement omitted.]

[fol. 375] SUPREME COURT OF THE UNITED STATES

DESIGNATION BY THE APPELLEES OF THE ADDITIONAL PORTIONS OF THE RECORD AND TRANSCRIPT AND STATEMENT OF THE EVIDENCE THAT THEY DESIRE AND DIRECT TO HAVE PRINTED AS UNDER RULE 13, SUBSECTION 9, OF THE SUPREME COURT OF THE UNITED STATES—Filed March 27, 1933

To Charles Elmore Cropley, Clerk of the United States Supreme Court, Washington, D. C.:

For the purpose of complying with the revised rules of the Supreme Court of the United States, and particularly Rule 13, paragraph or subsection 9, you are hereby advised that by this written designation the appellees point out, request, and require the printing of the following portions of the record which the appellees deem material in addition to those portions thereof designated by the appellant for printing herein in conformity to the said rule and the said sub-section, to-wit:

Transcript pages

45 [fol. 376]. First. So much of Section 24 of the franchise contract between the City of Lexington and the Central Kentucky Natural Gas Company, to be found upon page 45 of the transcript as certified from the United States District Court for the Eastern District of Kentucky to this Court by S. W. Stacey, Clerk, as is in these words:

"The Company hereby agrees and binds itself by the acceptance of this franchise to take all reasonable means and measures necessary to furnish

Transcript pages

an adequate supply of natural gas to the City of Lexington and its inhabitants at all times during the term of this franchise."

47 Also Section 34 of said franchise, to be found upon page 47 of the record, which is in these words:

"The Board shall have the power to establish such reasonable ordinances, rules and regulations to carry into effect the provisions of this franchise as it may deem necessary, and to modify, alter and amend such ordinances, rules and regulations from time to time."

94 Second. All of paragraph 13, (to be found upon page 94 of the transcript) of the Court's order of March 8th, 1930, which begins thus:

"Said plaintiff is further ordered and directed to give to each customer a receipt for the amount paid by him pending the final judgment of this Court; and said Company is directed to keep an accurate record of all sums paid in by each and all of its customers under said temporary rate; and said record so kept by said Company shall at all times be open for inspection to the City of Lexington, and to any customer as to such customer's contributions thereto, and to the attorneys, officials and agents for said City of Lexington, or such customer. Said Company is further required, whenever ordered by this Court, either upon the Court's own motion, or the motion of any party to this cause, to file in court a statement, or statements as the Court may require, showing the names of each and all of its customers who have contributed to said fund, and the amount paid in by each customer, such statement, or statements to be made up in orderly bookkeeping form."

124-5 127 Third. So much of the motion to be found upon pages 124-5, and upon page 127 of the transcript as is in these words:

Transcript pages

"Comes the plaintiff, Central Kentucky Natural Gas Company, and in accordance with the provisions of New Equity Rule 70½, now moves the Court to make the following special findings of fact, and to state separately its conclusions of law thereon, as follows:

Findings of Fact

That as of December 31, 1926, and also for the purposes of this case as of February 25, 1927, the date of the franchise contract, and as of October 9, 1929, the date of the rate order of the Railroad Commission of Kentucky, complained against herein, and as of the date of the final decree of this Court, the Court find: * * *

That the total reproduction cost new, less deterioration, and the total fair value of the rate base property of the plaintiff company, was and is as of the dates aforesaid, $3,669,400 and allocable [fol. 377] to the Lexington district $. 028,069.

"That the distribution system in the City of Lexington owned by Lexington Utilities Company and leased to plaintiff, was at all times herein used and useful in rendering the plaintiff's gas service in the Lexington district, and should be included as part of the rate base property for the purposes of this case; and that the reproduction cost new, less deterioration, and the fair value of said property, was and is as of the dates aforesaid, $611,227; that as of the dates aforesaid the total reproduction cost new, less deterioration, and the fair value of the combined properties of the plaintiff and Lexington Utilities Company, was and is $4,280,627, and that the fair value of said property allocable to the Lexington district, was and is $2,639,296."

Fourth. Sheet 14 of the Company's Exhibit 4 (unless appellant's requisition of the part of the record to be printed includes this sheet 14. The appellees are unable to determine whether said designation does include this sheet. If it does,

Transcript pages.

then this designation may be disregarded. If it does not, this designation is to be followed).

207–10 Fifth: Also all of that part of the appellant's "Condensed statement of pleadings before Railroad Commission of Kentucky and evidence essential to decision of questions presented on appeal," as appears upon pages 207-8-9-10, in nature a letter of date April 12th, 1928, addressed by Robert H. Winn and D. C. Hunter, as attorneys for complainants, to Mr. Henry T. Duncan, Lexington, Kentucky, and Mr. D. L. Hazelrigg, Frankfort, Kentucky.

210–12 Sixth. Also from pages 210-11-12 of the transcript and from said last above-named papers, the words beginning "Judge Winn: I would like to ask Mr. Hazelrigg," on page 210 of the transcript, and ending with the words "filed by Mr. Kimball in today's hearing," on page 212.

Seventh. All of sheet 7 of the Company's Exhibit 9, filed by the appellant as a part of the transcript herein.

Eighth. All of sheet 9 of said Company's Exhibit No. 4.

Ninth. All of Carter Exhibit No. 8, filed as a part of the record by the appellant in this court.

Tenth. The right-hand half of Carter Exhibit 10, filed here by the appellant as part of the record on the appeal, beginning with the words: "Rate of return for Lexington District (Central [fol. 378] Kentucky Natural Gas Co. Inc.) (Lexington Utilities Co. Inc.)." and ending with the words "Jirgal's cost of reproduction depreciated to Kimball condition, $1,799,626. 22.8%."

234–85 Eleventh. The entire contents of the paper entitled "Amendments proposed by the appellees to the appellant's statement of the evidence for the appeal," being pages 234 to 285, inclusive, of the transcript on file herein.

Transcript pages

Twelfth. So much of the gas purchase contract between the United Fuel Gas Company and the Central Kentucky Natural Gas Company as is now set out:

288 (a) Beginning with the words "This agreement, made and entered into this 1st day of November, A. D. 1912", and ending with the words "do hereby agree as follows", the said portion appearing on page 288 of the transcript, certified to this court by S. W. Stacey as Clerk of the United States District Court for the Eastern District of Kentucky.

289 (b) The entire third paragraph of said contract, which begins on page 289 of said transcript, and ends with the first two lines on page 290 thereof.

293–4 (c) The entire eighth paragraph of said contract, which begins on page 293, and ends on page 294, of said transcript.

297 (d) From the transcript the following words appearing on page 297 thereof:

"Unless previously terminated pursuant to the provisions herein contained, or by mutual consent of the parties hereto, this contract shall continue for the term of twenty years from this date, and so long thereafter as the United Company produces gas in marketable quantities from its gas properties in West Virginia and Kentucky."

300 (e) The attestation clause and the signatures thereto of the said contract appearing upon page 300 of the transcript.

309 [fol. 379] Thirteenth. A certain letter addressed by the Central Kentucky Natural Gas Company to the Kentucky Cities Gas Company, c/o B. C. Tynes, President, of date July 9th, 1927, to be found upon page 309 of the transcript.

323 Fourteenth. So much of the contract between the Bed Rock Oil Company and the Central Kentucky Natural Gas Company as is to be found on page 323 of said transcript as is in these words:

Transcript pages

(a) "This contract made and entered into this 20th day of November, A. D. 1918, by and between Bed Rock Oil Company, a Kentucky corporation, party of the first part, and the Central Kentucky Natural Gas Company, a corporation organized under the laws of the State of Kentucky, party of the second part, witnesseth."

324 (b) Also so much of said contract as appears on page 324 of said transcript, which part is in words and figures as follows, to wit:

"The party of the second part agrees . . . to take and pay for all the natural gas in and underlying said lands, not exceeding five million cubic feet per day, during the six winter months, at the rate of eight (8) cents per thousand cubic feet . . . and second party agrees to take and pay for during the six summer months at said rate of eight (8) cents per thousand cubic feet."

326 (c) Also the entire fifth paragraph of said contract appearing upon page 326 of the transcript herein, beginning with the words "when the supply of natural gas available", and ending with the words "cancel this contract".

329 (d) Also the attestation clause and the signatures to said contract appearing upon page 329 of the transcript.

321 (e) Also that letter appearing on page 321 of said transcript, of date June 29th, 1922, addressed by W. C. Walker, Vice-President of the Central Kentucky Natural Gas Company to G. C. Davison, Pres. Bed Rock Petroleum Company.

335 [fol. 380] Fifteenth. So much of the agreement between the Hillsdale Gas Company and the Central Kentucky Natural Gas Company as appears upon page 335 of said transcript and as is in these words:

(a) "This agreement made and entered into the 24th day of January, A. D. 1924, by and between the Hillsdale Gas Company, a corporation under

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the laws of the State of Delaware, of Covington, Kentucky, party of the first part, and Central Kentucky Natural Gas Company, Incorporated, a Kentucky corporation, party of the second part, witnesseth."

338 (b) Also so much of said contract as appears upon page 338 of said transcript as is in these words:

"The party of the first part undertakes and agrees that it will sell to the party of the second part, so soon as said connecting line is completed, and the party of the second part undertakes and agrees to purchase and take from the party of the first part, during each year of the existence of this contract, and beginning with the date of the completion of said connecting line and compressor plant, natural gas of not less than seven hundred and twenty million (720,000,000) cubic feet."

340 (c) Also so much of said contract as appears upon page 340 of said transcript as is in these words:

"The party of the second part undertakes and agrees that from the time of the commencement of deliveries, it will pay to the party of the first part for the natural gas sold and delivered to it by the party of the first part the rate or price of twenty (20) cents per thousand cubic feet, and that said rate shall be increased by an amount equivalent to thirty-three and one-third (33⅓) per cent. of any increase in the net domestic rate which the party of the second part may hereafter obtain in the City of Lexington, Kentucky."

342 (d) Also so much of said contract as appears upon page 342 of said transcript and as is in these words:

"In case the supply available for delivery hereunder to the party of the second part so diminishes that the party of the first part is unable to deliver [fol. 381] five hundred thousand (500,000) cubic

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feet, on an average per day, during the winter period, namely, from November to April, inclusive, either party shall have the right, upon six months' written notice, to cancel this contract."

344 (e) Also so much of said contract as appears upon page 344 of said transcript and as is in these words:

"Unless previously terminated pursuant to the provisions herein contained, or by mutual consent of the parties hereto, this contract shall continue for the term of ten (10) years from the date of the completion of said connecting line, measuring station, and compressor plant."

344 (f) Also the attestation clause and the signatures to said contract appearing upon page 344 of the said transcript.

346 Sixteenth. So much of the agreement between Lewis Vincent and the Central Kentucky Natural Gas Company as appears upon page 346 of said transcript and as is in these words:

(a) "This agreement made and entered into this 20th day of April, A. D. 1925, by and between Lewis Vincent, of Pittsburgh, Pennsylvania, party of the first part, and Central Kentucky Natural Gas Company, Incorporated, a Kentucky corporation, party of the second part, witnesseth."

349 (b) Also so much of said contract between Lewis Vincent and the Central Kentucky Natural Gas Company as appears on page 349 of the transcript and as is in these words:

"The party of the second part agrees to purchase gas from the party of the first part under the terms and conditions hereinbefore specified until such time as in the judgment of the party of the second part it is no longer profitable to maintain and operate its said six and five-eighths (6⅝) inch pipe line. This contract shall terminate when second party shall cease to operate its said six and five-eighths (6⅝) inch pipe line, after which

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no further liabilities shall accrue, and either party may reclaim its property used for the purpose of this contract."

350 [fol. 382] (c) Also the attestation clause and the signatures to said Lewis Vincent contract appearing on page 350 of the transcript.

Robt. H. Winn, C. W. Harbison, Attorneys for the Appellees.

Service of the foregoing directions to the Clerk of the Supreme Court of the United States, designating the portions of the record directed by the appellees to be printed, is hereby accepted on behalf of the appellant this March 22nd, 1933.

Henry T. Duncan, Chester J. Gerkin, D. L. Hazelrigg, Attorneys for Appellant.

[fol. 383] [File endorsement omitted.]

[fol. 384] SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING ADDITIONAL PORTIONS OF RECORD TO BE PRINTED—Filed March 27, 1933

To Charles Elmore Cropley, Clerk of the United States Supreme Court, Washington, D. C.:

The parties appellant and appellees, at the request of appellant, now stipulate that the following additional portions of the record shall be printed, being additional portions of the Franchise Contract, to-wit, all of Section 22, Section 27, and Section 30.

This March 24, 1933.

Henry T. Duncan, D. L. Hazelrigg, Chester J. Gerkin, Attorneys for Appellant. Robt. H. Winn, C. M. Harbison, Attorneys for Appellees.

[fol. 385] [File endorsement omitted.]

[fol. 386] SUPREME COURT OF THE UNITED STATES

STIPULATION DESIGNATING ADDITIONAL PORTIONS OF RECORD TO BE PRINTED—Filed March 31, 1933

To Charles Elmore Cropley, Clerk of the United States Supreme Court, Washington, D. C.:

The parties appellant and appellee, at the request of the appellees, now stipulate that the following additional portion of the record shall be printed, to-wit: the order entered in this cause by the trial court on July 29th, 1932, overruling appellant's Petition for Modification and Amendment of the Opinion.

This March 30th, 1933.

D. L. Hazelrigg, Chester J. Gerkin, Henry T. Duncan, Attorneys for Appellant. Robt. H. Winn, C. M. Harbison, Attorneys for Appellees.

[fol. 387] [File endorsement omitted.]

Endorsed on cover: File No. 37,476. E. Kentucky D. C. U. S. Term No. 779. Central Kentucky Natural Gas Company, appellant, vs. Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest, and James Hatcher, members constituting said Railroad Commission, et al. Filed March 15, 1933. File No. 37,476.

IN SUPREME COURT OF THE UNITED STATES

No. 779, October, 1932, Term

CENTRAL KENTUCKY NATURAL GAS COMPANY, Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Appellees

STIPULATION

The parties appellant and appellee, at the request of the appellees, now stipulate that there shall be printed as a portion of the record on appeal herein that certain contract between the Central Kentucky Natural Gas Company and the Lexington Gas Company, as Exhibit No. 21 in the proof on file in the District Court of the United States, for the Eastern District of Kentucky, in this cause, being that same paper referred to as item No. 6 of the papers composing the record herein, as set forth on page 194 of the printed record in this cause as on file in the office of the clerk of the above-styled court.

This April 29th, 1933.

Henry T. Duncan, Attorney for Appellant. Robt. H. Winn, Attorney for Appellees.

This contract, made and entered into this the 15th day of December, 1905, by and between Central Kentucky Natural Gas Company, a corporation organized under the laws of the Commonwealth of Kentucky, party of the first part, to be known hereinafter as the "Natural Gas Company", and the Lexington Gas Company, a corporation organized under the laws of the Commonwealth of Kentucky, party of the second part, to be known hereinafter as the "Lexington Company",

Witnesseth:

That whereas the Natural Gas Company is the owner of a natural gas franchise in the City of Lexington, Kentucky, whereby said Natural Gas Company has the right and privileges to construct and maintain a plant and system of pipes for the purpose of selling natural gas to the consumers of Lexington and vicinity; that said Natural Gas Company has already constructed about seven (7) miles of pipe lines

within the City of Lexington, with a view of exercising said franchise and has already purchased large quantities of pipe and other materials for the purpose of completing said natural gas plant in Lexington and vicinity, and,

Whereas, the Lexington Company is the owner of a franchise in the City of Lexington, Kentucky, for the purpose of furnishing the consumers of said city with gas, and the said Lexington Company is now exercising said franchise and is engaged in making and furnishing gas in said city; now, therefore, for and in consideration of the sum of one ($1.00) dollar, cash in hand paid to the Natural Gas Company, and for and in consideration of the faithful performance of the terms and conditions hereinafter set out, the said Natural Gas Company hereby sells, assigns, and transfers to the Lexington Company its natural gas franchise and all rights and privileges thereunder within the purview of this contract and all its pipe lines already constructed and all of its pipes and other material already purchased for said plant and under contract of purchase, upon the following terms and conditions, to-wit:

(1) That the Lexington Company will pay to the Natural Gas Company the cost price of said natural gas franchise and the cost price of all the pipe lines already laid in said city, together with all the cost of construction, freight and other necessary expenses connected with the purchase and construction and transportation of said pipe lines and other materials and the cost price of all said pipes and material already purchased and under contract of purchase, it being understood that such material purchased and under contract of purchase does not exceed the necessary uses of the Company.

It is further agreed that the Natural Gas Company shall make out a statement of the money expended up to January 1st, 1906, for the aforesaid franchise, material, freight and construction work, and shall present said statement to the Lexington Company on or before January 10, 1906, and thereupon said Lexington Company shall, within ten days thereafter, pay to the said Natural Gas Company, the money expended as aforesaid.

(2) The Natural Gas Company will proceed with the construction of said natural gas plant in Lexington and vicinity with due diligence so as to have an adequate sys-

tem of lines that will furnish natural gas to the citizens of Lexington and vicinity; the Lexington Company to pay the Natural Gas Company the actual cost and expenses so incurred in the construction of said system, such cost and expenses not to include salaries of officials of the Natural Gas Corporation, and on the first day of each month, after work is done and material furnished, the Natural Gas Company shall render to the Lexington Company an account for statement of the cost of construction and material furnished and thereupon the said Lexington Company shall pay said Natural Gas Company the sum expended as aforesaid within ten (10) days after such account is presented.

An "adequate system" of lines in this clause shall mean piping all the principal streets, as indicated in plan hereto attached, as rapidly as shall be found necessary for the performance of any contracts made by the Natural Gas Company.

(3) The Lexington Company shall have the right to decide on the size of the lines to be laid, provided, however, the said pipe lines shall be large enough to give adequate service to the consumers, and shall have general supervision of the construction of such lines and the depth the lines are to be buried.

(4) Whenever the low pressure system of lines becomes inadequate to give reasonable service to consumers, arising from growth of city in any particular locality, and it is necessary to supplement the supply, then high pressure mains shall be extended to such a point as may be necessary to remedy the defect.

(5) Wherever the Lexington Company's cast iron line-extend and this construction can be used, the Natural Gas Company shall attach these lines to the wrought iron system. And it shall be the duty of the superintendent of the Natural Gas Company to give Lexington Company a reasonable notice of the probable time that the Natural Gas Company will be ready to connect its wrought iron system to the cast iron system, and thereupon when Natural Gas Company is ready, such connection shall be made and natural gas thereafter can be used.

(6) The Lexington Company shall lease and does hereby lease to the Natural Gas Company, its gas franchise, for

the purpose of this contract, both artificial and natural, and does hereby lease to said Natural Gas Company its entire system of pipes upon the following terms and conditions:

A. That the Natural Gas Company will, monthly, pay to the Lexington Company, twelve and one-half per cent (12.5%) of the earnings of the Natural Gas Company, subject to deduction for expenses hereinafter provided.

B. The Natural Gas Company shall continuously exercise such franchise and shall supply consumers in Lexington and vicinity with natural gas as is provided in said natural gas franchise.

C. The Lexington Company shall continue to operate its plant, be responsible for all expenses relating thereto, and be the recipient of all receipts arising from gas furnished by it until the Natural Gas Company shall be prepared to turn its gas into the pipes of the Lexington Company, whereupon the control of the distribution of gas to the consumers in Lexington shall pass, under the provisions of this contract, to the Natural Gas Company.

D. This lease shall remain in full force and effect as long as the Central Kentucky Natural Gas Company has a full supply of gas, provided, however, that this lease shall not be forfeited for want of supply because of any accident to lines or wells, and only when there has been a shortage for one hundred and twenty (120) consecutive days; provided, also, that when the Central Kentucky Natural Gas Company fails to supply natural gas on account of shortage for one hundred and twenty (120) consecutive days, said lease shall thereupon cease and determine all rights thereunder of the Natural Gas Company to franchise and property of the Lexington Company end.

The Lexington Company shall, however, purchase such gas as the Natural Gas Company has to sell at seventy-five per cent (75%) of the selling price of such gas to the public at such time, provided same can be marketed, but in no event shall the cost price of such gas to the Lexington Company exceed thirty (30) cents for one thousand (1,000) cubic feet; the gas so purchased by the Lexington Company to be measured at the different delivery points in the city with a satisfactory measuring device to

be agreed upon by the contracting parties, and the gas is to be measured and computed at the standard pressure of six (6) ounces to the square inch into the system of the Lexington Company; the Lexington Company to continue to take gas as long as the Natural Gas Company can deliver five hundred thousand (500,000) cubic feet daily.

E. The Lexington Company is to pay for change in taps and service pipes to such size as will give good service to all persons who are connected at present to the mains of the Lexington Company's plant.

F. After the city and vicinity have been fully piped, extensions are not to be made beyond three hundred (300) feet of street main for each house, and not to exceed one hundred twenty five (125) extensions each year, without the consent of the Lexington Company, except in cases of groups of houses, or new additions to the City where there is more than one house, when such groups of houses or additions may be reached by an average of three hundred (300) feet of the street main to each house.

It is understood that such extensions shall not necessitate overcoming any unusual conditions.

G. After the Natural Gas plant has been installed all extensions, and from main to curb—including curb box and cock is to be done at cost by the Natural Gas Company, the same as in the principal construction, and a bill rendered to the Lexington Company each month to be paid within ten (10) days after the presentation of said bill.

H. The Natural Gas Company shall have entire control of fixing the price per thousand cubic feet at which gas shall be sold, and shall have entire control of the delivery and sale of the natural gas in said city.

I. The Natural Gas Company shall be allowed each year for running expenses as follows:

For the year 1906	$5,000.00
For the year 1907	7,500.00
For the year 1908	10,000.00

and $10,000.00 for each year thereafter, and running expenses shall be held to include office, rents, salaries, the reading of meters, collection of bills, the Company's

management, the care, supervision and maintenance of the plant, and all expenses connected therewith.

J. During the construction of the plant and until the gas is turned on, all of the office expenses and the Superintendent's salary shall be included in the construction cost, and after the gas is turned on and until an adequate system shall have been completed a fair proportion of the Superintendent's salary shall be included in the construction charges, and such charges shall be included in the monthly statements rendered.

K. The Natural Gas Company shall make payment to the Lexington Company of the twelve and one-half per cent (12.5%) provided for under the terms of this contract on the 15th day of each month out of the earnings of the Natural Gas Company for the preceding month.

L. The present cast iron system shall as soon as possible be put in first class condition, clamping where necessary under the direction of E. Strong and S. T. Murdock.

Casualty insurance shall be taken out on the whole Lexington plant for protecting the Natural Gas Company and the Lexington Company against loss from injuries to persons, the cost of the premium to be paid by said parties as follows: the Natural Gas Company to pay such an amount as will bear the same relation to the whole premium as the screw joint lines bear in feet to the cast iron mains, the balance of the premiums to be paid by the Lexington Company; these payments in said proportions to be made during the life of this lease, and thereupon the Lexington Company shall be released of all liability to claims for damages to persons or property during the term of this contract so far as any of the claims may arise from the use or operation of the Lexington plant, and said Natural Gas Company agrees to indemnify said Lexington Company in the event of any recoveries against the Lexington Company arising from claims for damages to persons or property in the operation and use of said plant.

The taxes upon all assessments of taxation of the gas plant operated under this agreement are to be paid as follows:

The Lexington Company is to pay all taxes upon the tangible property of the plant. The taxes upon the in-

tangible property, or in other words the "franchise taxes" are to be paid by the two companies in the ratio of the net earnings received by each company as provided in this agreement.

The Lexington Company shall have the right at all proper times to examine such books and accounts of the Natural Gas Company as may be necessary to verify the statements of the receipts and earnings under this contract.

M. Any question of dispute arising between the Lexington Company and the Natural Gas Company shall be determined by S. T. Murdock for the Lexington Company and E. Strong or John Tonkin for the Natural Gas Company, and, in the event of a disagreement between them, they shall select a third party and the decision of a majority shall be final upon the question in dispute.

It is understood that either Company, in the event of the death or inability to attend to any subject of dispute, of either of the persons named, may name a substitute in place of the aforesaid designated persons.

In witness whereof the Central Kentucky Natural Gas Company and the Lexington Gas Company have hereunto caused their corporate seals to be affixed and the same to be attested by their Presidents and Secretaries on the day and year first above written.

Central Kentucky Natural Gas Company, by (Signed) Joseph Seep, President. Attest: (Signed) Robert Hampton, Secretary. Lexington Gas Company, by (Signed) Louis Des Cognets, President. Attest: (Signed) Henry Rainey, Asst. Secretary.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

I, S. W. Stacey, clerk of the above-styled court, hereby certify that the foregoing eight pages constitute and are a complete and full copy of Exhibit No. 21, a contract between the Central Kentucky Natural Gas Company and the Lexington Gas Company, in that suit heretofore and now upon the docket of this court, styled Central Kentucky Natural Gas Company vs. Railroad Commission of Ken-

tucky, et al., and that the same is that paper referred to in item No. 6 on page 235 of the record sent up from this office to the office of the clerk of the Supreme Court of the United States on the appeal herein; and that the said paper was among those approved by the trial court as a part of the transcript for the said appeal.

Witness my hand and seal this 26th day of April, 1933.

S. W. Stacey, Clerk, by —— ——, Deputy Clerk.

(Seal U. S. District Court, East. Dist. of Ky., U. S. of America.)

(3319)

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

Before Moorman, Hickenlooper, and Dawson, Constituting a Statutory Court

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

ORDER—Filed May 17, 1933

Came the plaintiff in this cause and filed certified copy of the order of the Supreme Court of the United States entered on May 9, 1933, reading as follows:

"It appearing from the record on appeal to this Court that the applicants are not parties to the appeal, their application for leave to appear specially for purposes of moving to dismiss the appeal, and for leave to present such motion is denied. On examination of the papers submitted by the applicants, and in view of the provision of the decree under review with respect to the distribution of the impounded funds, the Court is of the opinion that the applicants should be made parties to the appeal, and in order that proceedings for that purpose may be taken, the hearing of the cause is postponed and the cause is assigned for oral argument on October 9, 1933,"

and moved the court: (1) That an alias citation be issued by this court against Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Kelp, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson and H. E. Stevens, individually and as representing any and all other gas consumers of the City of Lexington associated with them, including all gas consumers who may be associated with them under the name of Gas Consumers League of Lexington, Kentucky, or otherwise; and (2) that plaintiff be permitted to execute an additional bond, if this court shall so require, running to said parties

and other gas consumers associated with or represented by them;

And the court being advised, and all parties being heard, sustains the motion for an alias citation and directs that such citation be issued and has this day signed and issued the same.

The court being of opinion that no additional bond is necessary, the same is not required.

May 17, 1933.

Chas. H. Moorman, Smith Hickenlooper, Circuit Judges. Chas. I. Dawson, U. S. Dist. Judge.

District Court of the United States for the Eastern District of Kentucky (At Lexington)

In Equity. No. 578

Central Kentucky Natural Gas Company, Plaintiff,

v.

Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest, and James Hatcher, Members Constituting said Railroad Commission; Bailey P. Wooten, Attorney General of the Commonwealth of Kentucky; City of Lexington, a Municipal Corporation, and S. B. Featherston, Individually and as Representing All Other Persons Similarly Situated, Defendants

Alias Citation of Appeal—Filed May 17, 1933.
S. W. Stacey, U. S. Clerk

United States of America, ss:

To Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Kelph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson, and H. E. Stevens, individually and as representing any and all other gas consumers of the city of Lexington associated with them, including all gas consumers who may be associated with them under the name of Gas Consumers League of Lexington, Kentucky, or otherwise:

You are hereby citated and admonished to be and appear in the Supreme Court of the United States, within forty

days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Eastern District of Kentucky, from a final decree signed, filed and entered on the 22nd day of September, 1932, in that certain suit, being In Equity No. 578, wherein the Central Kentucky Natural Gas Company is plaintiff and you are defendants and appellees, to show cause, if any there be, why the decree rendered against the said appellant, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorables Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky, and Smith Hickenlooper and Charles H. Moorman, Judges of the United States Circuit Court of Appeals for the Sixth Circuit, acting as the Statutory Three-Judge Court in the above entitled cause, this 17th day of May, 1933.

Chas. H. Moorman, Judge of the United States Circuit Court of Appeals for the Sixth District. Smith Hickenlooper, Judge of the United States Circuit Court of Appeals for the Sixth District. Chas. I. Dawson, District Judge for the Western District of Kentucky.

Service waived.

J. A. Edge, Atty. Interveners.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, S. W. Stacey, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original order of the Court made and entered on May 17, 1933, and the original Alias Citation Of Appeal issued May 17, 1933, in the case of Central Kentucky Natural Gas Company vs. Railroad Commission of Kentucky et al., No. 578, now remaining among the records of the said Court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the aforesaid Court, at Lexington, this 23rd day of May, A. D. 1933.

S. W. Stacey, Clerk, by Spencer L. Finnell, Deputy Clerk. (Seal U. S. District Court, East. Dist. of Ky., U. S. of America.)

[Endorsed:] United States District Court, E. District of Ky. Certified copy.

Received Jul. 14, 1933. Office of the Clerk Supreme Court U. S.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

NOTICE—Filed Oct. 13, 1933

To Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Kelph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson and H. E. Stevens, individually and as representing any and all other gas consumers of the City of Lexington associated with them, including all gas consumers who may be associated with them under the name of Gas Consumers League of Lexington, Kentucky, or otherwise, and J. A. Edge, Attorney for said parties:

1. That on December 20, 1932, the plaintiff, Central Kentucky Natural Gas Company, filed with the Judges of the Statutory Court sitting in the above styled action its Petition for Appeal, and Assignment of Errors; that on the same day the Judges of said court entered an order allowing said appeal; that on the same day a supersedeas bond was duly executed and approved by said Judges.

2. That on December 20, 1932, the said Central Kentucky Natural Gas Company, appellant, filed in the office of the Clerk of said Statutory Court its Statement of Jurisdiction.

3. Pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States you are hereby served with copies of the aforesaid Petition for Appeal, Order Allowing Appeal, Order Approving Supersedeas Bond, Assignments of Error, and Statement as to Jurisdiction in the above entitled cause. Your attention is directed to the provisions of Rule 12, paragraph 3, of the aforesaid Rules

of the Supreme Court of the United States, which said paragraph reads as follows:

"3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

4. That on the 16th day of January, 1933, the above named plaintiff filed in the office of the clerk of the court in the above styled action, its præcipe for a transcript of the record to be filed in the Supreme Court of the United States pursuant to the appeal allowed in the above entitled cause entered by said court on December 20, 1932. A copy of said præcipe is filed herewith attached hereto marked "Exhibit A".

5. That on the 16th day of January, 1933, the said plaintiff lodged with the Clerk of said court a "Condensed Statement of the Pleadings before the Railroad Commission of Kentucky and Evidence Essential to Decision of Questions Presented on Appeal," a copy of which is attached hereto marked "Exhibit B".

6. That on the 31st day of January, 1933, there was lodged with the clerk of said court for and on behalf of the City of Lexington and certain other defendants, appellees, their Amendments to the Plaintiff's Statement of Evidence, a copy of which is attached hereto marked "Exhibit C"; that as modified by the Judges of said court the said Statement of Evidence lodged on behalf of the plaintiff, Central Kentucky Natural Gas Company, as aforesaid, and the said Amendments thereto lodged by the defendants aforesaid was duly approved by the Judges of said court and certified by them to be true, complete and properly prepared, and the same were thereafter filed with the clerk of said court on March 9, 1933.

7. That the clerk of said court thereafter made and certified a transcript of the record in said cause as required

by said præcipe and including the aforesaid Statement of Evidence and Amendments thereto, as approved by the Judges of said court, and said transcript was duly filed with the clerk of the Supreme Court of the United States on the 15th day of March, 1933.

8. That on March 18, 1933, the appellant, Central Kentucky Natural Gas Company, filed with the clerk of said United States Supreme Court its "Statement of Points to be Relied upon and Designation of Parts of Record to be Printed", the same being fully set forth in the printed copy of the "Transcript of the Record" prepared by the clerk of the United States Supreme Court, a copy of which is hereto attached marked "Exhibit D".

9. That on March 27, 1933, the attorneys for the City of Lexington and others, appellees, filed with the Clerk of the Supreme Court of the United States their designation of additional portions of the record and statement of the evidence which they desired to have printed. The same appears in said printed record above referred to, a copy of which is attached hereto marked "Exhibit D".

10. That on March 27, 1933, three was also filed with the clerk of the Supreme Court of the United States a Stipulation designating additional portions of said record to be printed as appears in the aforesaid printed record marked "Exhibit D".

11. That on March 31, 1933, there was also filed with the clerk of the Supreme Court of the United States a further Stipulation designating additional portions of said record to be printed as appears in the aforesaid printed record designated as "Exhibit D".

12. Your attention is called to the aforesaid printed copy of the "Transcript of Record" attached hereto marked "Exhibit D" which sets forth fully and completely the record and Statement of Evidence and amendments thereto which were certified by the clerk of said Statutory Court sitting herein and caused to be printed by the Central Kentucky Natural Gas Company, appellant, and by the City of Lexington and others, appellees, and upon which this cause is sought to be heard and submitted before the United States Supreme Court.

13. You are further notified that on April 20, 1933, the appellant, Central Kentucky Natural Gas Company, filed its printed brief with the Clerk of the United States Supreme Court; and you are further notified that on May 6, 1933, the said appellant, Central Kentucky Natural Gas Company, filed with the clerk of said court its Reply Brief. Copies of said two briefs are attached hereto marked respectively "Exhibit E" and "Exhibit F".

14. You are further notified that the appellant is ready and willing to cooperate with you in having filed with the clerk of the Supreme Court of the United States at the earliest practicable date and to have the same printed, pursuant to stipulation or other appropriate method, such additional portion or portions of the record and evidence as you may consider essential to the appeal (subject however, to the right of appellant to object to any portion or portions of the record or evidence designated by you as not being in fact essential to the appeal)—to the end that there may be no delay in the proper certification and printing of such additional portions of the record and evidence, and in order that there may be no delay in the hearing and submission of this cause in the United States Supreme Court.

Henry T. Duncan, D. L. Hazelrigg, Chester J. Gerkin, Attorneys for Central Kentucky Natural Gas Company, Appellant.

Dated Lexington, Kentucky, July 11, 1933.

Service is hereby accepted of the foregoing Notice, together with copies of the papers and exhibits therein referred to. This 11 day of July, 1933.

J. A. Edge, Attorneys for Mrs. Hignight and others.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, S. W. Stacey, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original notice "Received Office of the Clerk Supreme Court U. S. Jul. 14, 1933" and filed in this office on October 13, 1933, in the case of Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky

et al., No. 578, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Lexington this 13th day of October, A. D. 1933.

S. W. Stacey, Clerk, by Spencer L. Finnell, Deputy-Clerk. (Seal U. S. District Court, East. Dist. of Ky., U. S. of America).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY, APPELLANT,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1933

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OK KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

PRÆCIPE FOR TRANSCRIPT OF ADDITIONAL PORTIONS OF RECORD —Filed Oct. 27, 1933

To the Clerk of the above court:

You are hereby requested to make a transcript of the following additional portions of the record herein to be filed in the Supreme Court of the United States on the appeal in the above entitled cause, to-wit:

1. Petition of Intervenors to be made parties to the action, tendered November 2, 1929, and filed December 7, 1929.
2. Order entered December 7, 1929, filing said petition.
3. Motion of Intervenors to dismiss for want of jurisdiction, filed November 8, 1929.
4. Order filed March 8, 1930.
5. Order filed March 24, 1930.

Said transcript to be prepared as required by law and the Rules of this Court, and the rules of the Supreme Court of the United States, to be filed in the office of the Clerk of the Supreme Court of the United States at Washington at the earliest possible date.

Dated October 27, 1933.

J. A. Edge, Attorney for Mrs. George Hignight and others, Intervenors.

Service of above Præcipe accepted and acknowledged this 17th day of October, 1933.

D. L. Hazelrigg, Henry T. Duncan, Attorneys for Central Kentucky Natural Gas Company. Robert H. Winn and Clinton M. Harbison, B. P. Wootton, Attorneys for Railroad Commission of Kentucky et al., Defendants.

[fol. b] In United States District Court for the Eastern District of Kentucky, at Lexington

Central Kentucky Natural Gas Company, Plaintiff,

vs.

City of Lexington, a Municipal Corporation, and S. B. Featherstone et al., Defendants

Petition to be Made Party — the Action—Tendered Nov. 2, 1929; filed Dec. 7, 1929. S. W. Stacey, U. S. Clerk

Now come Mrs. Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Hardy, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson and H. E. Stevens, and present this their petition to be made parties to this proceeding, and be permitted along with the defendant, The City of Lexington, and the citizens defendant, S. B. Featherstone, to participate in this proceeding and aid in its prosecution. The petitioners respectfully show the Court that it is provided in Section 37 of the franchise involved in this litigation that "where the rates or regulations as provided for under Section 7 by the Company or the City, any customer, or group of customers of the Company may appear and become a party thereto". These petitioners state that they file herewith as part hereof a copy of said franchise, and mark same for identification Exhibit "A".

[fol. c] These petitioners state that in conjunction with some four thousand other gas consumers of Lexington, that they have been actively participating in the Fayette Circuit Court and the Railroad Commission of Kentucky, cooperating with the City of Lexington in procuring a fair and just gas rate for the citizen of the City of Lexington.

They respectfully ask that they be permitted to become parties hereto and to file such pleadings and to participate in all proceedings in this case as the representatives of the gas consumers of the City of Lexington.

Respectfully submitted.

J. A. Edge, Attorney for Petitioners.

IN UNITED STATES DISTRICT COURT

ORDER FILING PETITION OF INTERVENORS, ETC.—Entered December 7, 1929

"This cause coming on for hearing, came the plaintiff and by leave of Court filed its amended bill of complaint herein, and the same in noted of record.

On motion of Mrs. George Hignight, et al., it is now ordered that the petition to be made a party herein tendered November 2, 1929, be and the same is now filed and noted of record.

This cause came on to be heard on the plea to the jurisdiction of the court, the motion of the defendants and the intervenors to dismiss the bill and the motion of the plaintiff for an interlocutory injunction. The Court heard argument of counsel, and not being fully advised, takes time and it is ordered that said plea and motions be and they are now submitted; the parties hereto being allowed time within which to file briefs."

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTIONS TO DISMISS—Filed March 8, 1930

[fol. d] This cause having been submitted on the motion of the defendants to dismiss the bill of complaint for want of jurisdiction, and also on the motion of the defendants to dismiss the bill of complaint for want of equity, and also on the motion of the Plaintiff for an interlocutory injunction, and the Court being now advised, it is ordered as follows:

1. The motion of defendants to dismiss the bill for want of jurisdiction is overruled, to which ruling the defendants except.

2. The motion of the defendants to dismiss the bill for want of equity is overruled, to which ruling the defendants except.

IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—Filed March 24, 1930

By agreement of parties herein, it is ordered as follows:

1. That by this agreed order the objection to the jurisdiction of the Court are not waived, but are specifically reserved.

2. That this cause be now submitted for final judgment on the pleadings herein and on a duly or properly attested or certified copy of the record, including briefs, in the case of City of Lexington, and others, v. Central Kentucky Natural Gas Company before the Railroad Commission of Kentucky, and that the testimony and exhibits introduced and offered by the parties, as shown by the transcript thereof, before said Railroad Commission shall be considered and used as the testimony and exhibits offered on behalf of the parties hereto, subject to objections for competency and relevancy to be made and heard upon the trial, but provided that the avowals made by parties on behalf of [fol. e] witnesses whose testimony was offered, as shown by said transcript of the testimony before the Railroad Commission, shall be considered as the testimony of said witnesses subject to objections thereto on the ground of competency and relevancy, to be made and heard upon the trial.

2. It is further ordered by agreement of parties that the plaintiff shall have to April 1st, 1930, within which to file its brief; that the defendants shall have to May 1st, 1930, thereafter within which to file their brief or briefs; that the plaintiff shall have ten (10) days thereafter within which to file its reply brief, and the defendants ten (10) days thereafter within which to file their rejoinder brief, should they so desire.

The foregoing order should be entered.

Chas. H. Moorman, Smith Hickenlocker, Circuit Judges. Chas. I. Dawson, District Judge. D. L. Hazelrigg, L. K. Langdon, Chester J. Gerkin, Allen, Botts & Duncan, Attorneys for Central Kentucky Natural Gas Company. City of Lexington, by James J. O'Brien, Mayor. Robert H. Winn and David C. Hunter, Attorneys for the City of Lexington and Others. J. W. Cammack, Attorney General, on Behalf of Railroad Commission and Members Thereof. S. H. Brown, Assistant Atty. Gen. of Kentucky. J. A. Edge, Attorney for Intervenors.

[fol. f] Clerk's certificate to foregoing transcript omitted in printing.

[fol. g] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

NOTICE OF LODGMENT OF ADDITIONAL AMENDMENTS TO THE APPELLANT'S STATEMENT OF EVIDENCE FOR THE APPEAL AND FIXING TIME FOR APPROVAL PURSUANT TO EQUITY RULE 75 (b)—Filed Oct. 28, 1933

* * * * * * *

To the plaintiff and original defendants in the above-styled action:

You, and each of you will take notice that the intervenors, Mrs. George Hignight, and others, have prepared amendments to the appellant's Statement of Evidence for the appeal under Equity Rule 75 (b) for use in connection with the appeal granted herein from the decree entered in the above entitled cause, which said additional amendments to the appellant's Statement of Evidence was this day lodged in the office of the Clerk of the above entitled Court for your examination.

Please take further notice that said intervenors will ask the above entitled Court, and the Judges thereof, to approve said amendments to appellant's Statement of Evidence on Saturday, the 28th day of October, 1933, at 10 o'clock, A. M. of said day, or as soon thereafter as Counsel can be heard, in Chambers of the Honorable Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky, in the United States Government Building in the City of Louisville, State of Kentucky.

Dated October 27, 1933.

J. A. Edge, Attorney for Mrs. George Hignight and Others, Intervenors.

Service accepted this 27th day of October, 1933.

Robert H. Winn and Clinton M. Harbison, B. P. Wootton, Attorneys for Railroad Commission of Kentucky et al. D. L. Hazelrigg, Henry T. Duncan, Attorneys for Central Kentucky Natural Gas Company.

[fol. 1] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

Amendments to the Appellant's Statement of Evidence Proposed by Mrs. George Hignight and Others, Intervenors—Filed Oct. 28, 1933

To the Clerk in the above-styled court:

In addition to the "Condensed Statement of Pleadings before the Railroad Commission of Kentucky and Evidence Essential to a Decision of Questions on Appeal" filed by the Central Kentucky Natural Gas Company in this cause on Monday, January 16, 1933, the intervenors, Mrs. George Hignight and others, state that the following papers and testimony are also essential to a decision of the questions presented by this appeal; and you are requested and directed to make a transcript thereof to be filed in the Supreme Court of the United States pursuant to the appeal allowed herein, as promptly as the same may be done, as follows, to-wit:

1. The Order of said Commission entered February 1, 1928 (Commission Order Book, p. 556), as follows:

ORDER

"This proceeding came on to be heard before the Commission and on motion of the several litigants other than the plaintiff and defendant in the above styled proceeding to consolidate the several gas rate proceedings pending before the Commission. Pending the consideration of said motion it appeared to be satisfactory to the Counsel for the sundry parties that the various parties interested who may desire to intervene in this proceeding might do so and thus present and be heard upon whatever claim they might have [fol. 2] and might desire to make, relative to the entire matter; in consideration thereof, it is ordered that up until

the fifteenth day of February, 1928, such parties may appear and file herein their intervening petition or such other demurrers, motions, and steps as they may deem proper. Whereupon they shall become parties to this proceeding.

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2. The Intervening Petition of William T. McCray and others, filed March 14, 1928, as follows:

PETITION OF INTERVENORS

1. That the Central Kentucky Natural Gas Company is a Corporation, organized under the laws of the State of Kentucky, with power to deal generally in the production and sale of natural gas in the State of Kentucky and various parts thereof.

2. That said corporation is engaged in transacting its business in the County of Fayette, Kentucky, and has been so engaged for more than twenty years last past; that it is also engaged in similar business in the City of Lexington, Mt. Sterling and Winchester, Kentucky.

3. On information and belief the petitioners state that the Central Kentucky Natural Gas Company is now owned, controlled and dominated by the Columbia Gas and Electric Company, a Delaware Corporation.

4. The said Columbia Gas and Electric Company also owns, controls and dominates the United Fuel Gas Company, a corporation organized under the laws of West Virginia and engaged in the production, transportation and sale of natural gas in the State of West Virginia and in the State of Kentucky, and your petitioners state that said Columbia Gas and Electric Company, and said United Fuel Gas Company, being the real parties in interest in this proceeding, should be made parties thereto.

5. That the above mentioned Central Kentucky Natural Gas Company has filed before this Commission a schedule of rates which it is now charging and proposing to charge in the County of Fayette; that upon information and belief these petitioners state that said rates are unreasonable, unjust and extortionate.

Wherefore these petitioners pray that in the event the demurrer herein to the jurisdiction is overruled and that it is adjudged that this commission has jurisdiction herein, then, and in that event, that it proceed to examine the rates charged these petitioners, in the County of Fayette, and to fix a reasonable and just rate to be paid for the natural gas to be provided by said Central Kentucky Natural Gas Company in the County of Fayette, State of Kentucky.

(Signed) J. A. Edge, Attorney for Petitioners."

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3. The special demurrer (Intervening petition) filed before said Railroad Commission on March 14, 1928, by Mrs. George Hignight et al., as follows:

SPECIAL DEMURRER

[fol. 3] 1. That the City of Lexington is a municipal corporation of the second class:

2. That the Central Kentucky Natural Gas Company is a corporation, organized under the laws of the State of Kentucky within the power to deal generally in the production and sale of natural gas in the State of Kentucky and various parts thereof.

3. That said corporation is engaged in transacting its business in the City of Lexington, and County of Fayette, Kentucky, and has been so engaged for more than twenty years last past, and it is also engaged in similar business in the cities of Winchester, Mt. Sterling, Kentucky.

4. On information and belief the petition states that the Central Kentucky Natural Gas Company is now owned and controlled and dominated by the Columbia Gas and Electric Company, a Delaware Corporation.

5. That said Columbia Gas and Electric Company also owns, controls and dominates the United Fuel Gas Company, a corporation organized under the laws of West Virginia, and engaged in the production, transportation and sale of natural gas in the State of West Virginia and in the State of Kentucky and your petitioners state that said Columbia Gas and Electric Company and said United Fuel Gas Company, being the real parties in interest in this proceeding, should be made parties thereto.

6. That the above mentioned Central Kentucky Natural Gas Company has filed before this Commission a schedule of rates which it is now charging and proposing to charge in the City of Lexington; that upon information and belief these petitioners state that said rates are unreasonable, unjust and extortionate.

Wherefore, the petitioners pray that in the event the demurrer herein to the jurisdiction is overruled and that it is adjudged that this commission has jurisdiction herein, then, and in that event, that it proceed to examine the rates charged these petitioners in the City of Lexington, and to fix a reasonable and just rate to be paid for the natural gas to be provided by said Central Kentucky Natural Gas Company in the City of Lexington.

(Signed) J. A. Edge.

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4. The order of said Commission entered on October 9, 1929 (Commission Order Book, p. 158), as follows:

ORDER

"Counsel for both Complainants and Defendant were present in response to call from Chairman Glenn, to discuss the division, and what means should be adopted for the division of Impounded Funds. Mr. J. A. Edge filed with the Commission some four thousand names, and said he would file another list soon. He moves that steps be taken to divide this fund. After discussion of the case, the Commission wrote the order."

[fol. 4] 5. The petition filed on behalf of Mrs. Wellington Payne, Anna Mae Hollinger and four thousand other consumers before the Railroad Commission on the 9th day of October, 1929, as follows:

PETITION

"Now come your petitioners and state that they are citizens of Lexington, Kentucky, and consumers of gas furnished by the Defendant, Central Kentucky Natural Gas

Company, in said City, and present this petition on behalf of themselves and all other gas consumers of Lexington, Kentucky, similarly situated and respectfully petition this Honorable Railroad Commission to require the Central Kentucky Natural Gas Company to pay into this Commission, or to its Receiver, the five cents per thousand cubic feet of gas held by it, and under the judgment and findings of this Commission, subject to be refunded to these petitioners, and those persons for whom they sue, and that this Honorable Commission distribute said five cents per thousand cubic feet, and that it also cause to be distributed the fund now held by Hon. John H. Carter, the receiver under the appointment by this Honorable Commission, after the necessary costs and expenses have been paid.

Wherefore, petitioners respectfully pray that the funds now held by the said gas company be turned over and paid by the receiver of this Commission and that said fund and the fund now held in impoundment by the receiver of this Railroad Commission be distributed to these petitioners and those persons for whom they sue, after the reasonable and proper costs of this proceeding, not chargeable to the Defendant, Central Kentucky Natural Gas Company; they pray for their costs and all proper relief.

(Signed) J. A. Edge, Attorney for Petitioners."

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6. Also the following portions of the testimony and exhibits filed before said Railroad Commission, as hereinafter set forth and enumerated:

(a) At the hearing before the Railroad Commission on March 14 and 15, 1928, John T. Kimball, witness for Central Kentucky Natural Gas Company, filed Company Exhibit No. 4 bearing date January 4, 1928, and entitled "Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc. Based on Operating Reports of the Central Kentucky Natural Gas Company, Inc., for the years 1922 to 1926, Inclusive." The pages of said exhibit (omitted from appellant's "Statement of Evidence") on the subject of Amortization are filed herewith, as a part hereof, marked "Company Exhibit No. 4" being pages 29 to 44 inclusive, attached hereto.

At the aforesaid hearing before the Railroad Commis-[fol. 5] sion said witness, John T. Kimball, testified concerning "Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies". Said witness testified as follows (Transcript of Evidence before Railroad Commission, Vol. 1, pages 203, 212); and on "Cost of Financing" (Vol. 1, pages 99–101).

On page 28 is the summary of the "Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance, and Contingencies". That is subdivided into three major headings, the first being, "Estimated Annual Allowance Necessary for Amortization and Depletion", and that is in turn divided between "Central Kentucky Natural Gas Company, and the Lexington Utilities Company." For the entire system, this allowance is estimated at $158,794, and for the Lexington District, at $94,668.

Referring to page 29, the natural gas utilities differ from other public utilities in that it is not a continuing operation. There is no replenishment of the supply of the commodity, and the service life of a natural gas company is limited by the available supply of natural gas. With the exhaustion of the gas fields, the utility must cease to function. Because of condition, the rate for natural gas should include, as one element, an amount which will permit the Company to recover the value of its property used in public service. In other words, it puts in pipe lines, bores wells, and buys other equipment, and as soon as it is out of gas, it goes out of business, consequently in doing the business it must collect in rates an amount to enable it to collect its investment in its property, and I have made an investigation of how much should be included in the rate, so that the company will get back what it has invested or used in the service, and in getting at this amount, which I call "Amortization and Depletion", I have assumed that the twenty year period is the length of time over which the Company should recover that investment, and that assumption is based on the three following considerations:

1. It is a longer period of time than any conservative investor or banker would consider for sinking fund purposes on securities issued against a natural gas enterprise;

2. It is impossible to foretell with any degree of accuracy, the life of a natural gas field, especially those of West Virginia and Kentucky. Some of these fields, depending on the rate of depletion, go down very rapidly; others not drawn on so rapidly, continue for a longer time. The life of the field depends not on how much is in the field, but on how much is withdrawn, not only at the present time, but during the future years. Thus it is a very difficult thing to estimate the natural life of a natural gas utility. You know [fol. 6] there is gas there to be sold, but how long it will last, is hard to tell. You can go out and determine with fair accuracy how much gas is in the proven acreage, but to tell whether they will find a new field tomorrow, which will change your entire conclusion, is impossible; so I believe an estimate of this kind should not be predicated on a longer period of more than twenty years over which the Company should recover back the money put in its equipment, etc.

The third element I have considered, is that the franchise which this Company has bought, is for a twenty year period, and at the end of the twenty year period, the Company has no rights whatever in the streets of the City of Lexington, or to serve the consumers therein.

So with these three considerations in mind, I have said in this set-up that the Company recover over twenty years this investment.

Now, if the rates are sufficient to permit it, the money which they take in and which is estimated for this case for the entire Company to be $158,794 per year, would be set aside in an investment of the soundest kind, so that the payments on the fund, would exactly equal the property devoted to public service, at the end of the twenty year period; and I have taken that interest rate at the rate of about 3½%, that being the rate which the Federal Government pays on securities at this time; and the soundest rate that I know of so as to absolutely safeguard the fund.

There are certain items of property, however, which obviously have a lesser life than twenty years. For example, the wells of the Red Bush Field, we know were brought in in 1923. From 1923 to the latter part of 1926, they have taken out of the wells, 80% of the original gas; so obviously, at that rate of withdrawal, those wells cannot last much [fol. 7] longer than two years from 1926; as a matter of

fact, at the end of 1927 there was only nine per cent left. That proportion was determined by the drop in rock pressure.

Mr. Duncan: At that rate it would be exhausted in less than two years, would it not?

The Witness: It would.

Now, page 33 is a statement setting forth the details of the way in which this amortization and depletion allowance was arrived at. In the first column of this statement—first column of figures, there is the heading, "Estimated Reproduction Cost New Less Deterioration as of December 31, 1926," and that column of figures will be found on page 31 of Exhibit No. 1.

In the second column on this sheet is the "Estimated Net Salvage" value. When the property no longer functions as a natural gas utility, it may be possible to remove some of the pipe lines and sell them to a junk dealer, who will dispose of them. The same holds good of other equipment. Whatever the Company can get out of it will be that much.

The next column is the "Remaining Life" in years, which I have stated is the twenty year period, with the exception of some of the items which obviously have a lesser life than twenty years.

In the fourth column is the "Rate", and 3.54% is the sinking fund rate; in other words, if you put $3.54 away each year in an investment paying interest at the rate of 3½%, at the end of twenty years you would have $1.00 interest, and that is what appears in this fourth column; you have to put aside twenty times that much in twenty years, or $70.80, but the interest accumulation brings it up to $100 by the end of the twenty year period. So we apply that per cent, and the amount of property subject to amortization, and the product is shown in the fifth column, [fol. 8] which is the amount of money shown that each of these should set aside annually, which would yield the amount of amortizable value at the end of the twenty year period.

The sixth column is the basis of the amortization; which is along the lines that I have described, but in allocating the property of the Lexington District. And the last column is the amount of the amortization charge which ap-

plies to the amount of business done in the Lexington District.

The only bit of additional information in this connection might be in connection with the distribution system property. Upon the exhaustion of natural gas, it is likely that artificial gas will be substituted in Lexington. Naturally the present gas wells will have no place in an artificial gas plant, so that we amortize the whole of the wells; but the mains in Lexington could be used to distribute artificial gas. That applies also to the meters and the service, but there would be required a considerable expenditure to adapt these mains to artificial gas. You must have mains laid to grade and instal drips, which is not necessary in natural gas. Therefore, I have assumed that when natural gas is wholly gone, that the natural gas utilities will be able to dispose of these mains and what is left at 50% of its production cost new; that per cent being what the artificial utility would pay to the natural utility, giving consideration to the fact that it would have to spend considerable money to adapt it to artificial gas, that much money to make it take care of artificial gas. Therefore, I have only amortized 50% of it for the twenty year period.

Page 36 is the same character of set up; that is, the continuation of the Central Kentucky Natural Gas Company and the total is shown on page 37.

Page 38 shows the same computation for the Lexington Utilities Company.

Now on page 39 there is a description of the "Estimated [fol. 9] Annual Allowance Necessary for Extraordinary Maintenance," as follows:

"In order to keep the property in the best operating condition, with the least distortion to net earnings from year to year, provision should be made annually for extraordinary repairs and replacements in addition to ordinary maintenance. This provision is to cover such expenditures as the replacement of pipe, re-rubbering the dresser couplings, and other unforeseen expenditures which, if not provided for annually, may seriously cripple the Company when it is confronted with large expenditures of this character in a single year. These estimated amounts are necessary only to keep the property in good operating condition and they are not considered sufficient to permit

of the creation of a reserve. In other words, over a period of years it is anticipated that the expenditures will equal these allowances, and when natural gas is no longer available the property will then be in substantially the same physical condition as at the present time.

As shown on the following statement the allowance for extraordinary maintenance are made for structures, compressing station equipment, pipe lines, telephone lines, furniture and fixtures, automobiles, and engineering and interest during construction."

And the details of that computation are shown on page 41.

"During the time that the Central Kentucky Natural Gas Company is in operation, it must provide for the annual depreciation of its property, replacement of the parts as they are worn out, must maintain its property in a good, serviceable condition, or it can't meet the service requirement. Therefore, it must, from time to time make rather expensive replacements of the parts worn out. Occasionally the rubber on the couplings which joins the two pipes together must be replaced; they rot out. And that means you have to go out and dig up the pipe lines and that entails an enormous expenditure; and the couplings have to be kept tight; and the expenses have to include an allowance to cover that sort of replacement work. In the determination of these costs for other companies, I have gone back over for periods of ten or fifteen years and found out what it actually cost various companies to maintain their property. I made that sort of investigation of the East Ohio Gas Company that serves the City of Cleveland, with about two hundred and fifty thousand consumers. I went over its records and found that the cost of the replacements have approximated one per cent of the value of the property. I made the same investigation for the Hope Natural Gas Company, and the same for the Logan Natural Gas Company; and these percentages used on this statement on page 41 are predicated on our experience with those companies; and in this case the summary is shown on page 28 for the entire system, both the Central Kentucky Natural Gas Company and the Lexington Utilities Company, and there is annual charge for the Central Kentucky Natural Gas Company of $33,474 and applicable to the Lexington District, $21,262."

* * * * * * *

[fol. 10]

Page 30, Company's Exhibit No. 1, Testified to by J. T. Kimball, Witness for the Company

Lexington Utilities Company, Inc.

Summary Classified by Accounts

Classification	Estimated cost of Reproduction as of Dec. 31, 1926 New	Less deterioration
Organization costs	$20,050	$20,050
Distribution System Property:		
Lexington, Ky.		
Land Owned in Fee	1,920	1,920
Structures	3,069	1,930
Regulator Structures	1,633	1,415
Mains	316,159	290,074
Services	80,334	72,702
Meters	125,493	106,069
Regulators	6,040	5,134
Other Equipment	935	713
Total Distribution System Property	$536,183	$481,166
Construction Overheads:		
Engineering during Construction	21,447	20,347
Legal Expenses during Construction	8,043	8,043
Administration Expenses during Construction	10,724	10,724
Taxes, Insurance and Damages during Construction	5,362	5,362
Interest during Construction	36,505	33,138
Total Construction Overhead	$82,081	$77,614
Cost of Financing	$25,797	$25,797
Total Property	$670,711	$611,227

[fol. 11] (b). Excerpt from Direct Testimony of J. T. Kimball as Witness for the Defendants from Volume 1 Page 99 to 101 on March 14, 1928.

The next major division of the property is the "Cost of Financing", details of which are shown on page 126. In that item is included cost of assembling the money necessary to construct property such as that of the Central Kentucky Natural Gas Company. It has been estimated at 4% of the cost of that.

Mr. Edge: I would like to ask whether you estimated it or had it done?

The Witness: I have estimated that at 4%, and that, in my opinion, is an ultra conservative estimate. Recently Ford, Bacon & Davis constructed and promoted an electric light and power plant down in the Pecos Valley in

Western Texas to supply the power for oil wells; and in doing that we had to go to the bankers to get that money, and it cost about 10 points; that is, $10 on every $100 raised, to get that money; that is what the bankers charged us for their services in supplying us with money to go ahead and build that power plant. There have been two natural gas power plants financed by us recently down in Texas.

Judge Lilly: We object to that.

The Witness: I am merely attempting to show the basis of my estimate.

Judge Lilly: This record would be interminable if he goes into that.

Chairman Glenn: Mr. Edge asked him how he arrived at that 4%.

Judge Lilly: He asked him if he was making a statement from his own knowledge or on information received from somebody else.

Mr. Duncan: As I understand it, he is giving the reason why he estimated it at 4% and how he arrived at it.

Chairman Glenn: Yes, sir; I think that is perfectly competent. Go ahead, Mr. Kimball.

The Witness: Very recently there have been natural gas projects down in Texas where the rate has ranged from 5% to 8% or 9%, as I recall. I recently had occasion to make an engineering report for a banking house in New York for the financing of a natural gas enterprise in Kansas, and of my own knowledge the cost there was from seven to ten dollars for every hundred dollars for furnishing money by that banking house.

[fol. 12] I have recently worked on a large number of toll bridges which have been financed by banks, and I know of my own knowledge that the cost ranges from seven per cent to ten per cent of the money involved in the construction of those toll bridges. It represents the service that they render, just as an engineering firm renders in the construction of any project. They have to furnish and distribute the capital with which to finance the enterprise.

Cross-examination of December 12, 13, 1928:

Counsel: On the next page, 126, you have written in cost of financing, on which you have taken four per cent of

$3,650,695 and brought in a capitalizable asset of $146,028. Does your experience as an engineer, and your knowledge of the rules as set out by the Supreme Court in cases of this nature, justify that charge?

The Witness: My experience as an engineer does.

228. Do you know anything about some decisions from the Supreme Court on the subject?

A. If you are referring to the Galveston case, I read that.

229. From the Supreme Court of the United States?

A. I can quote it for you if you wish.

230. But you remember it?

A. They excluded an item called brokerage.

231. In what respect does this item differ from the four per cent brokerage item in the Galveston case?

A. I can only tell you what this includes: this is the service rendered by the bankers in assembling the capital necessary to construct this plant, and it is analogous to service that you might render for the Company or that I might render as an engineer to the Company. They go out and sell and distribute these bonds through the Company, sell them to the public.

[fol. 131] 232. Do you not know that the Supreme Court has in the Galveston case denounced that as any such item of cost?

The Witness: I don't know that that brokerage item is the same item that I have included.

233. Do you agree with them, that brokerage should be excluded?

A. I think that there is a very real service supplied by bankers in assembling capital.

234. You don't agree with the Supreme Court then, do you?

A. There is a question, and I am not prepared to say whether I do or do not.

219. Do you chance to know how successful the Central Kentucky Natural Gas Company has been in the past?

A. Those exhibits show since 1922.

220. Do you know anything about there being a bond issue?

A. I believe they were originally financed in that way.

221. How much?

A. As I remember the figure, it was $600,000.

222. Or possibly $800,000?

A. I don't know; I thought it was six.

223. Do you know whether that has been retired from earnings?

A. Been retired.

224. From what sources?

A. Sacrifice of profits because they didn't pay themselves a fair and reasonable return on the property.

225. Do you know what dividends they have been drawing and for how long?

[fol. 14] The Witness: That is not relevant; but I have the figures here.

226. Have you the figures there?

A. Yes; I have all the figures here.

Counsel: I wish you would tell me what dividends they have drawn, paid.

Mr. Duncan: We desire to interpose an objection that that has no relevancy upon the questions at issue, that is, the value of this property today.

Judge Winn: In the customary course of the practice, I will state that I will connect it; I make that averment.

Chairman Glenn: Proceed then.

To the above ruling of the chairman of the Commission, counsel for defendant excepted.

The Witness: Of course, the amount of dividends paid, unless expressed in value of the property on which they were earned, mean little or nothing. The corporation may be under capitalized or over capitalized, but the true value in the figure on which it should be computed in percentages; but I will give these figures in dollars, not in percentage:

In 1906 there was no dividend;
In 1907 there was no dividend;
In 1908 it paid $75,000;
In 1909 it paid $37,500;
In 1910 it paid $75,000;
In 1911 $37,500;
In 1912 there was no dividend;
In 1913 there was no dividend;
In 1914 there was no dividend;
In 1915 there was no dividend;

[fol. 15] Beginning 1916 and each year thereafter up to and including 1926, which is as far as my record goes, the dividend was $90,000 per year.

227. Do you know what the capitalization of the Company has been throughout this time?

A. No.

228. $1,500,000?

A. They may have had a great surplus; I don't know.

229. And you don't know what the capital was or is now?

A. No, I can't state that.

230. Do you know for what that capitalized stock was issued in the beginning?

A. No, I don't.

231. Do you know whether any money at all was paid in for it other than turning over the lease?

A. I am advised that the promoters, which correspond to my originators, got a very substantial block of that $50,000 for their services.

232. Do you know how substantial?

A. No.

233. Wasn't it all issued as a bonus?

A. I don't know.

234. Your testimony as to value has been based solely upon this theory of reproduction cost less depreciation, has it not?

A. Yes, less deterioration, I prefer to call it.

Counsel: I will adopt your phraseology.

Can you tell the Commission how many dollars of deterioration you have allowed in this property up to December 31, 1926, all told?

[fol. 16] The Witness: Yes, that can be computed from the statement on page eight of Exhibit Number One, and it is merely the difference between the cost of reproduction new and the cost of reproduction new less deterioration, and those figures are for the Central Kentucky Natural Gas Company, or possibly you prefer it for both that Company and the Lexington Utilities Company.

Counsel: I would, sir.

The Witness: Both, $4,715,434 cost new, from which should be deducted the amount of deterioration, which leaves $4,280,627 cost new less deterioration; that difference amounts to $434,807.

Counsel: Now, you have valued the entirety of the property as under your figure at $4,715,434 which during twenty years of life you have depreciated to $4,280,627—or de-

teriorated. What per cent of deterioration is that during the twenty years of the life of the Company?

The Witness: Well, that isn't quite the way to express it.

Counsel: Do you mind calculating and telling what percentage $434,807 is of $4,715,434?

The Witness: I will make the computation for you. (The witness does so.) That is 9.4 per cent.

235. Which during the twenty years means that the entire properties of the Companies, according to your estimates here, have deteriorated slightly under one half of one per cent per annum.

[fol. 17] The Witness: Absolutely not. I can come here thirty years from now, and if the Company continues, it will be in that same relation, and as the property wears out, it substitutes new property, so that it remains the same practically from year to year.

235. Suppose the Company takes out from the expense account these replacement costs, is it still justifiable, in your judgment, to depreciate your property less than one half of one per cent a year?

A. I haven't depreciated it that.

236. You have depreciated it $434,807 and this is mathematically correct, isn't it?

A. Yes, but you are relating two things that are not relatable.

Counsel: All right. I looked at page eight of your Exhibit Number One, at the foot of it, and I find these totals, new, $4,715,434; less deterioration $4,280,627, and for me you figured the difference between the two figures as $434,807?

The Witness: Yes.

Counsel: Now, as against that, I asked you whether or not any additions that have been made to keep the property up to an A 1 condition have not been charged on the Company's books and taken out as an annual expense?

The Witness: I don't think that is wholly true.

[fol. 18] 237. In what part is it true?

A. It is partly true, but not 100% true.

238. To what extent is it true?

A. I don't know exactly, but I know that they took out some of the plant line and borrowed money to replace it, but in general, for the purposes of your argument, I will grant you that it comes out of expenses.

Counsel: On page 42 of your Exhibit Number Four you have allowed as an annual expense against earnings what is termed "Estimated Annual Allowance Necessary for Extraordinary Maintenance" and against the Lexington district $12,878; on sheet 43 for the distribution system property you have made a similar allowance of $8,384.

The Witness: That is for the Lexington Utilities Company.

Counsel: Or a total for the two of——

The Witness: Twenty-one thousand dollars plus.

Counsel: I believe that you have said that these sums are utilizable or are to be utilized in keeping the property up in high operating condition?

The Witness: Yes.

Cousel: On page 28 of your Exhibit Number Four you have this annual charge against the earnings, "Estimated Annual Allowance Necessary for Amortization, Depletion, [fol. 19] Extraordinary Maintenance and Contingencies," for the Lexington District of $94,668, which figures embrace as well the like item for the Lexington Utilities Company, being $82,477 for the Central Kentucky Natural Gas Company and $12,191 for the Lexington Utilities Company, a total of $94,668. Will you please explain to the Commission what this is?

The Witness: Yes, the two items combined, the amortization charge and the extraordinary maintenance charge are what are commonly grouped by many under the term depreciation, but I have chosen in this instance to divide the two as they add to $115,800 in round figures, which is equivalent to about four per cent of the valuation that I have placed on the property; and as to what each of those items embrace, I believe that I covered fully in the direct testimony.

239. What do you mean "amortization"? What is the ultimate end of building up and creating that fund?

A. Amortization is to return to the owners of the property the value of that property after, for natural gas purposes, it is fully depleted and it then has no further value as a natural gas utility.

240. And you have taken that in this instance at twenty years?

A. I have predicated these figures on an estimate of twenty years.

241. And what rate of per cent have you utilized in using an annual charge of $94,668?

A. I have assumed that that sum would be invested in Federal Government securities, which would yield around 3½ per cent, and that plus the interest accretions at the [fol. 20] end of the twenty year period would add up to the amortizable value of the property, which would at that time have no value.

242. So that is what you mean by amortization fund?

A. Yes.

Counsel: At the same time that you build up this amortization fund, you make an outlay of earnings each year of $20,000 necessary to keep the property in A-1 condition?

The Witness: That is right.

243. Is that justifiable?

A. Yes.

244. To cover the cost in both ways, take out amortization fund on your property and also take out a fund to keep the property in 100% condition each year?

A. Of course the amortization fund is not to take care of the replacements of the property, but only to return to the owners at the end of twenty years the value of the amortizable property. The $20,000 is to take care of the depreciation.

245. And you state to the Commission that both of them are proper charges?

A. Yes.

246. You have figured as I recall, a depreciation during the twenty odd years that this company's lines have been laid of some 10% and you are now going upon the theory that during the next twenty years the property will be depreciated 90%, its physical property will be depreciated 90% at least?

A. No, it will have a salvage value at that time to which I have given effect in these figures and to take care of [fol. 21] the value that has been totally lost to the time that it has no further value.

247. To do that, you have assumed that all available supplies of natural gas in the field will be exhausted?

A. The basis of that twenty year assumption is set forth on page 29 of Exhibit Number Four.

248. That is your theory. Is that correct?

A. Yes, as set forth on this page.

249. Do you know whether or not the Central Kentucky Natural Gas Company has sought new customers, has entered new towns?

A. I presume they have.

250. Have laid out new pipe lines and the like?

A. Yes.

251. And you assume that that was done, knowing that their life would only last twenty years?

A. No, that only estimates; that is a conservative estimate. It probably would last twenty years.

252. What about the limited supply?

A. I haven't testified that they have a limited supply.

253. You don't mean to say that it does now?

A. No.

254. Do you know who owns the stock of the Central Kentucky Natural Gas Company?

A. I believe the Columbia Gas and Electric Company owns a large block of it.

255. Isn't the United Fuel Gas Company a 100% subsidiary of the Columbia Gas and Electric Company?

A. I don't know, but it has a large interest.

256. Who is the big owner of the acreage from which this gas is coming?

[fol. 22] A. I presume the United Fuel Gas owns a large part of the acreage.

257. In other words, this Company that is distributing it in Kentucky and that Company are for all substantial pruposes one and the same Company?

A. Practically so, but legally that isn't true.

258. And so far as the supplies that are available are concerned for twenty or thirty years or forty years, that supply is to be determined not by what the Central Kentucky Natural Gas Company may have, but by what the United Fuel and the Columbia may have?

A. Oh, sure; as they extend their territory and deplete their territory and their reservoirs, the Central Kentucky Natural Gas Company will suffer along with the rest.

259. And any man that is foolish enough to build other pipe lines and go away from where he has a good market, you won't say that he is entitled to amortize the value of his property?

A. He is entitled to get his money back.

260. Even though he destroys it by going into other fields and destroys the life of it by going into new fields like the Central Kentucky Natural Gas Company is by going into Cynthiana and Georgetown?

A. He has got to get his money back. Naturally if he can get it back in five years he don't want to string it out over twenty years.

261. Is that good management?

A. From the Company's standpoint.

262. Don't you know where they have unbounded supply of gas that their theory has been to conserve it for the cus-[fol. 23] tomers already attached?

The Witness: About eight years ago the companies operating in Virginia thought that they had a very limited supply of gas and they preached conservatism and that went all the way to Cleveland but there have been extensions and they have discovered new fields and the situation is not in the same category, but we can't tell today what the situation will be tomorrow, and I state this is a conservative figure to which this company is entitled, and the company will suffer no detriment thereby by setting aside an allowance that will permit the money to come back to the owners over a period of twenty years. Many of them have amortized the property, not over twenty years, but over a period of ten years.

263. And with a consequently larger return to them?

A. No.

264. The shorter term upon which they predicate the life of the company, the shorter the time upon which they predicate the exhaustion of the natural gas, must be followed from very necessity, if your theory of amortization be sound, by increased amortization each year.

A. Of course if they increase the amortization, and if it didn't work out, then the proposition fell through and they didn't go ahead with it.

Counsel: Now, this much is true, in order that the Commission and I may understand it—here's a charge of $94,968 which is a matter of bookkeeping you are taking out of the Company's earnings each year and piling up in the Company's treasury, in order that at the end of twenty

years the Company may have in its coffers from this charge alone the total value of its entire property.

The Witness: Such of it as it at that time not further [fol. 24] used or useful.

Counsel: But you have taken all of it into consideration?

The Witness: No. I have said that a certain amount of it had a salvage value.

265. What part of it?

A. The distribution system in the City of Lexington. When natural gas is gone, the city will not doubt introduced artificial gas and use the same distribution system, and I have not amortized that.

266. Do you know anything about cannel coal as gas producing coal in that section and in Inez?

A. No.

267. So that you would not be able to state whether as a practical business use it would be practicable to use the cannel coal there and supply artificial gas for this section of the country?

A. Ford, Bacon & Davis has never made any study of that with respect to Inez, but we have made comparable studies with respect to such a thing in Virginia, with the idea of conveying that gas to Cleveland, and it was found not to be feasible.

268. Where did you get those figures?

A. In our office. I didn't personally make the figures.

269. Mr. Kimball, do you as an engineer or an expert in matters of this nature give any heed to the test of bargain and sale as a test of value.

A. No. That doesn't enter into the determination of the figure used for a rate basis, because that in itself is predicated upon earnings.

270. Do you know anything about the sale of the Cen- [fol. 25] tral Kentucky Natural Gas Company to the Columbia Gas and Electric Company since this franchise was entered into?

A. I merely know that there was an exchange of securities.

(c) Also the exhibit filed by the witness John T. Kimball on behalf of the Company designated as Company Exhibit No. 4, being pages 28 to 44 inclusive, attached hereto.

[fol. 26] (d) Excerpts from testimony of James A. Yunker before the Railroad Commission on June 27-28, 1929.

At the hearing before the Railroad Commission on June 27 and 28, 1929, James A. Yunker testified on behalf of Central Kentucky Natural Gas Company, as follows:

I live in Louisville and I am the Gas Engineer for the Louisville Gas and Electric Company which supplies natural gas to the City of Louisville and draws its natural gas supply from eastern Kentucky. For the past eight years it has been my duty to keep tab on all gas wells in Kentucky. Whenever a gas well is drilled we send someone to inspect it. The information is kept in my office, under my charge. I have made particular investigation of gas wells and gas supplies in eastern Kentucky. I have examined the statement of Lucien Beckner filed in this action setting forth his estimate of gas reserves in eastern Kentucky. I file herewith a map showing the counties in eastern Kentucky and the quantity of gas reserves as estimated by Mr. Beckner in each of *each* counties. The map has been drawn to scale.

* * * * * * *

In Pike County there have been a number of wells drilled during the past five or six years. Most of it has been negative. The drilling during the past three years shows gas in some areas in economic quantities, but 87% of the drilling has proved that the area in which the drilling was done did not contain gas.

In Leslie County several wells have been drilled in the last ten or twelve years. Our Company drilled on well down to the corniferous sand, the lowest producing sand in Kentucky. This well was dry. I know of no well that has been drilled in Leslie County that produced any gas.

In Letcher County all wells drilled to date have been negative.

In Perry County I do not know of any gas wells having been drilled.

In Knott County a number of wells have been drilled. Our Company drilled some twenty to twenty-five wells. The portion of Knott County which represents the northeastern corner contains gas. The balance of the territory that has been drilled has always been barren to this time.

In Knox County — was discovered in 1906 on the Big and [fol. 27] Little Richland Creek. A number of wells were drilled after that, but none produced gas in sufficient quantity to warrant piping into the town in the immediate neighborhood. Recently the Petroleum Exploration drilled what promised to be a promising well in the north central portion in Knox County. The Petroleum Exploration drilled two more wells which were dry.

In Clay County there are two promising gas developments at the present time. The number of wells drilled has been very limited but apparently some gas has been produced from that County.

In Carter County the drilling has not resulted in and economic production of gas.

In Martin County no gas has been produced since 1890. It was supposed to be largely depleted but drilling in the last two or three years has shown the existence of other gas areas.

In Laurel County there has been considerable drilling. During the oil excitement in 1916 and 1918, drilling was conducted in Lee, McCreary, Laurel and Pulaski Counties. None of them have produced economic gas wells.

In Greenup County there has been drilling but no economic gas wells have been developed.

In Whitley County there are some small gas wells but it has never been deemed of fixed quality (sufficient quantity) to warrant taking it to market.

In Pulaski County a number of wells have been drilled, but I know of no gas wells in that County.

In Boyd County, gas has been produced from wells in the shale for a number of years, and there are some wells in the City of Ashland.

In Magoffin County, three promising pools have been discovered. Some of these are partially depleted. Other promising wells have been drilled.

In Brethitt County one gas field has been discovered on Frozen Creek known as the Big Six field. The gas in that field has been practically exhausted. Our Company, in conjunction with the timber company, owning about thirty thousand acres, drilled five dry holes. There are no other producing wells except those on Little Frozen. We abandoned our wells.

[fol. 28] In Lewis County there has been no drilling to my knowledge.

In Elliott County there is one field. It has never been connected with the pipe line as a portion of it has been condemned by subsequent drilling. Some of the gas contains sulphur, and it is not as valuable as it otherwise would be.

In Jackson County there has been a fair amount of drilling, but no gas has yet been discovered.

In Rockcastle County a few sporadic wells have been put down, but I know of no gas development in that county.

In Rowman County I know of no gas, nor of any drilling for oil or gas in that County.

In Owsley County, the Petroleum Exploration owns a gas field but there is no gas in that County to my knowledge, outside of that development.

In Morgan County there has been considerable drilling, but the gas development has been very disappointing. Two small areas have been developed and this gas is locally used. Most of the drilling has been unsuccessful.

In Menifee County there is no gas field outside of that owned by the Central Kentucky Natural Gas Company.

In Wolfe County there is a small gas field in the northern end. It appears that there may be some gas produced from this county. At least half of Wolfe County has already been condemned by drilling.

In Wayne and McCreary Counties there has been considerable drilling for oil and in sporadic instances gas wells have been struck. Nothing has been done with the gas and from my interpretation of the term, gas has not been found in commercial quantities.

In Johnson County a number of wells have been drilled, but no gas areas have been discovered.

In Lawrence County some gas has been produced and there are a number of wells in that County.

Lee County, due to the oil excitement, has been almost [fol. 29] completely drilled up, and I know of no gas wells left there.

In Powell County there has been drilling, but I know of no gas wells in that County.

In the year 1928 the total withdrawal of natural gas from eastern Kentucky was, I should say, 22 billion cu. ft. I have made an estimate of the probable withdrawal of gas

from eastern Kentucky in 1929 and my estimate is that there will be withdrawn during 1929 in excess of 30 billion cu. ft.

The witness filed a map designated as "Yunker Exhibit No. 1." A photostat copy of this map is attached hereto.

I should hardly say that gas reserves in Pulaski, Laurel, Clay, Leslie, Perry, Knott, Pike, Letcher, Knox and Whitley Counties would be available to the Central Kentucky Natural Gas Company, through its present lines. Gas in those counties would be closer to Lexington than to the present transmission lines of the Central Kentucky Natural Gas Company. It would not be economical or practicable to bring gas from those counties to Lexington through the present transmission lines of the Central Kentucky Natural Gas Company.

Cross-examination of James A. Yunker by Robert H. Winn, Esq., of counsel for complainants:

Q. Your name is what?
A. Yunker.

Counsel: Spell it, please, sir.
The Witness: Y-u-n-k-e-r.

Q. Where were you born, Mr. Yunker?
A. Louisville, Kentucky.
Q. Lived there all your life?
A. Yes, sir.
Q. How old are you?
A. Thirty-nine my nearest birthday.
Q. Have you kept the same sort of watch of the Western Kentucky gas, as you have of the Eastern Kentucky?
A. Not as comprehensive.
[fol. 30] Q. Do you know anything about it?
A. Yes, sir.
Q. Any developments down there?
A. Yes, sir.

Mr. Duncan: We object; don't see how it has any bearing on this case.

Chairman Glenn: We sustain the objection.

Judge Winn: Have you the same knowledge of the West Virginia fields as you have of the Kentucky fields and of the supplies there?

The Witness: No, sir.

Q. Know nothing about the supplies in West Virginia?

A. We never had airy wells there and know nothing about it.

Q. Do you know whether the United Fuel is supplying gas now in the Central Kentucky line?

A. I know it is.

Q. Do you know as a matter of fact that it and the Central Kentucky Natural Gas Company are owned by the Columbia Gas & Electric Company?

A. Yes, sir.

Q. Mr. Yunker, you know Mr. Beckner?

A. Yes, sir.

Q. In whose employ is he?

A. Mr. Beckner at present is working as consultant, geologist for the Louisville Gas & Electric Company.

Q. That is the same corporation with which you work?

A. Yes, sir.

Q. That is a subsidiary of the Byllesby Corporation? [fol. 31] A. Yes, sir.

Q. Since when?

A. 1913.

Q. Do you know anything about Mr. Beckner having been asked as a geologist to make up in the last year or so, an estimated calculation of the supply of gas in Eastern Kentucky?

A. Yes, sir.

Q. Do you know whether he made for them the same figures that he supplied here?

A. I know he said one trillion and three million.

Q. For what purpose was that made?

A. To estimate the reserve in Eastern Kentucky.

Q. Do you know if that wasn't for the purpose of some negotiations that this estimate of reserve was made by Mr. Beckner for the Louisville Gas & Electric Company?

Mr. Duncan: We object; that is going pretty far afield. They asked him if he did make it, and that is sufficient.

Judge Winn: They have attacked Mr. Beckner's estimate and his reputation here. It is my purpose to show that

his work is acceptable as a geologist and has been accepted by the same corporation with which this gentleman is, and for whom he appears.

Mr. Duncan: We are not attacking Mr. Beckner as a geologist. He has done the best he could. We are simply showing that the actual experience of this Company has been in the counties where Mr. Beckner has endeavored to set up a reserve. That has nothing to do with Mr. Beckner's ability.

Chairman Glenn: You are introducing him as in rebuttal to Mr. Beckner.

[fol. 32] Mr. Duncan: Why, of course.

Chairman Glenn: He got up this same information for the Louisville Gas & Electric Company, therefore, we hold that he should answer this question.

Judge Winn: Here's the question: Do you know for what purposes, or for purposes of what negotiations the Louisville Gas & Electric Company had Mr. Beckner to make up this exhibit?

Mr. Duncan: We object.

Chairman Glenn: State your objection.

Mr. Duncan: That simply goes into the question of some business relation between the Louisville Gas & Electric Company and some other concern, and has no possible bearing on this case.

Chairman Glenn: For the same reason that the witness got up a similar statement for his Company, that they are both working for now, as he got up for this company, for that reason he may answer the question.

Mr. Duncan: I don't understand what you mean by "for his Company."

Chairman Glenn: He said he got up a statement for the Louisville Gas and Electric Company; Judge Winn asked him a while ago.

Mr. Duncan: But that is the only one he got up.

Chairman Glenn: I thought he got up a statement of this same field, his same locality, for this Company?

[fol. 33] Mr. Duncan: Which Company? There is only one Company that he has done that for.

Chairman Glenn: You asked him a while ago if he was working for the same Company that Mr. Beckner does, who got up this statement. You say he has a right to get this up.

We say he has. He testifies he is working for the same company; then he is competent to get up this.

Mr. Duncan: If Your Honor pleases, that wasn't the question. The question was, assuming, for the sake of the argument, that Mr. Beckner was competent, the reason why he got it up, or the Louisville Gas & Electric Company, got him to do this, has no bearing on this case. What the negotiations were between the Louisville Gas & Electric Company and some other concern has nothing to do with it.

Chairman Glenn: We have overruled your objection. Answer the question witness.

Mr. Duncan: We save the exception.

The Witness: Yes, sir.

Q. Was that for negotiations that the Louisville Gas and Electric Company was making?

Mr. Duncan: We object.

Chairman Glenn: I overrule your objection.

Mr. Duncan: Save our exception.

A. Mr. Beckner was asked to prepare this estimate of the gas in Eastern Kentucky because we were at that time con-[fol. 34] sid-ing purchasing sufficient acreage in Eastern Kentucky to provide a long time reserve for the Louisville Gas & Electric Company.

Q. Now, are you a geologist?

A. No, sir; I was at the time this report was made up, the head of the Geological Department of the Louisville Gas and Electric Company.

Q. Have you attended any geological school?

A. No, sir.

Q. Had any training as a geologist?

A. No, sir.

Q. Do you know whether Mr. Beckner is still a consultant geologist for the Louisville Gas and Electric Company?

A. Yes, sir.

Judge Winn: I believe that is all.

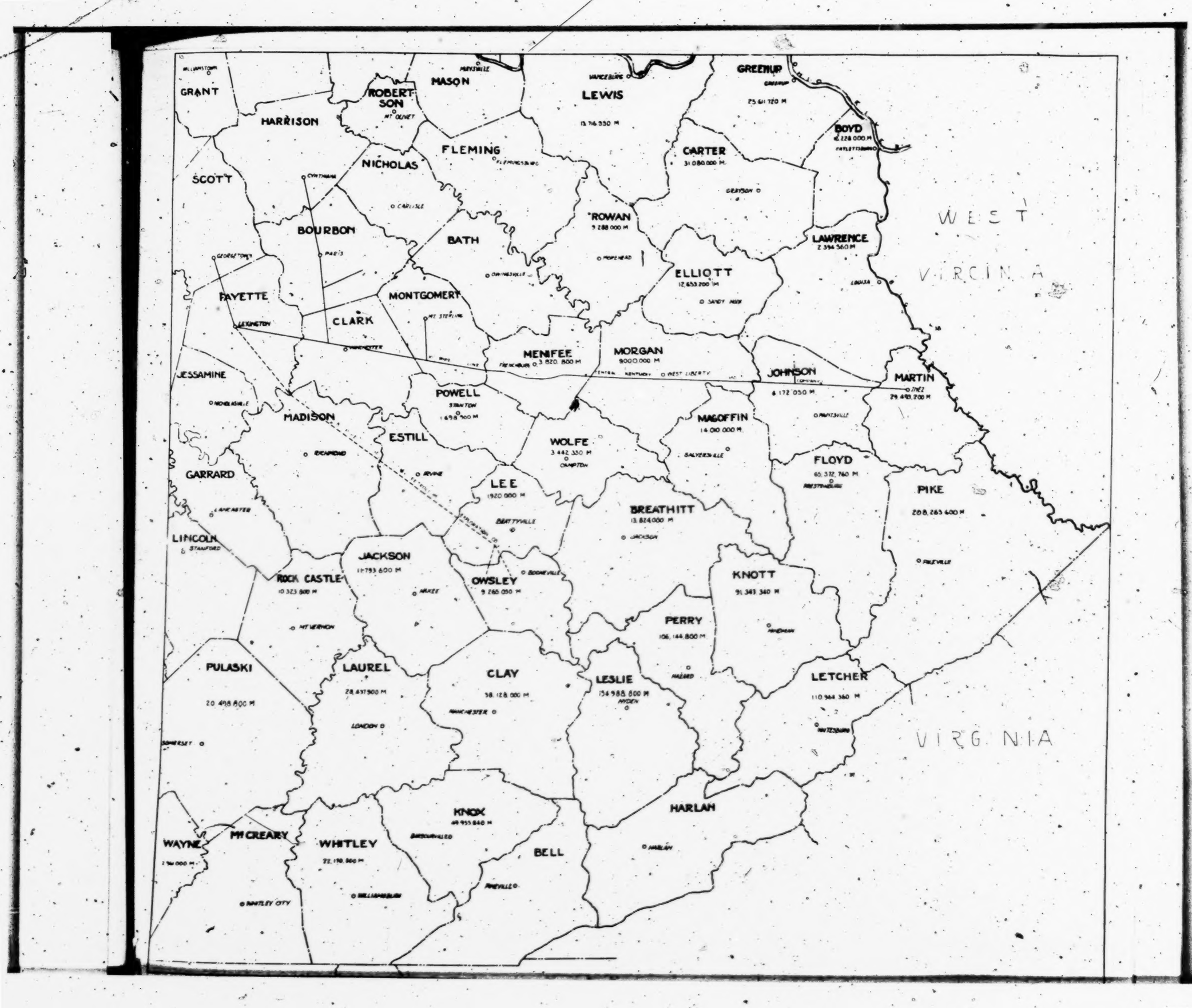
Chairman Glenn: Do you want to ask him anything further?

Mr. Duncan, No, sir; that is all.

And further the witness sayeth not.

* * * * * * *

(Here follows map, side folio 35)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ROBERT SON
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LEWIS
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NICHOLAS
CARTER
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BOYD
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PRESTONSBURG
SCOTT
CYNTHIANA
CARLISLE
GRAYSON
ROWAN
9 288 000 M
MOREHEAD
WEST
VIRGINIA
BOURBON
PARIS
BATH
OWINGSVILLE
LAWRENCE
2 394 560 M
GEORGETOWN
ELLIOTT
12 653 200 M
SANDY HOOK
LOUISA
FAYETTE
LEXINGTON
MONTGOMERY
MT. STERLING
CLARK
WINCHESTER
MENIFEE
FREDERICKSBURG
3 820 800 M
MORGAN
9000 000 M
WEST LIBERTY
JOHNSON
6 172 050 M
MARTIN
29 480 200 M
JESSAMINE
NICHOLASVILLE
POWELL
STANTON
1 698 900 M
MADISON
RICHMOND
ESTILL
IRVINE
WOLFE
3 442 350 M
CAMPTON
MAGOFFIN
14 010 000 M
SALYERSVILLE
PAINTSVILLE
FLOYD
65 372 760 M
PRESTONSBURG
GARRARD
LANCASTER
LEE
1920 000 M
BEATTYVILLE
BREATHITT
13 824 000 M
JACKSON
PIKE
208 265 600 M
PIKEVILLE
LINCOLN
STANFORD
JACKSON
11 793 600 M
BOONEVILLE
ROCK CASTLE
10 323 800 M
MUNCIE
OWSLEY
9 265 050 M
KNOTT
91 343 340 M
HINDMAN
MT VERNON
PERRY
106 144 800 M
HAZARD
PULASKI
20 498 800 M
LAUREL
28 437 500 M
LONDON
CLAY
58 128 000 M
MANCHESTER
LESLIE
154 988 800 M
HYDEN
LETCHER
110 964 360 M
WHITESBURG
SOMERSET
VIRGINIA
KNOX
69 955 840 M
BARBOURVILLE
HARLAN
WAYNE
2 541 000 M
McCREARY
WHITLEY
22 170 900 M
BELL
PINEVILLE
HARLAN
WILLIAMSBURG
BARBOURVILLE

[fol. 36] October 27, 1933.

J. A. Edge, Attorneys for Mrs. Geo. Hignight and Others, Intervenors.

We acknowledge receipt of a copy of the foregoing proposed amendments to the record and statement of evidence to be used on the appeal of this cause now pending in the United States Supreme Court.

This 27th day of October, 1933.

D. L. Hazelrigg, Henry T. Duncan, Attorneys for Cetral Kentucky Natural Gas Company. Robert H Winn and Clinton M. Harbison, B. P. Wooton, Attorneys for Railroad Commission of Kentucky et al., Defendants.

[fols. 37 & 38] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (AT LEXINGTON)

In Equity. No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY, Plaintiff,

vs.

RAILROAD COMMISSION OF KENTUCKY et al., Defendants

ORDER ALLOWING AMENDMENTS—Filed Oct. 28, 1933

It appearing to the Court that the United States Supreme Court has continued the hearing of this appeal until November 6, 1933, in order that Mrs. George Hignight and others, as Intervenors herein, and as Appellees, might have an opportunity to have transcribed and certified to the Clerk of the United States Supreme Court additional portions of the record and evidence herein; and it further appearing that said Intervenors have lodged with the Clerk of this Court Additional Amendments to the Statement of Evidence of Appellant to be transcribed and certified by the Clerk of this Court, and that notice of said lodgment has been given to and accepted by the Attorneys for the Plaintiff and the Defendants herein,

It is now ordered:

1. That the aforesaid additional amendments be, and the same are now hereby approved, and

2. The Clerk is directed to file the same and certify a transcript thereof to be filed on behalf of said Intervenors and Appellees, with the Clerk of the United States Supreme Court for the purposes of the appeal. To so much of the foregoing order as provides for the certification of evidence of appellant's witnesses John T. Kimball and James A. Yunker, the appellee City o Lexington and the appellant object.

Chas. H. Moorman, U. S. Circuit Judge. Smith Hickenlooper, U. S. Circuit Judge. Wm. J. Dawson, U. S. Dist. Judge.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] COMPANY EXHIBIT No. 4

(Pages 28 to 44, Inclusive)

Net Revenue Available for Return on Property of Central Kentucky Natural Gas Company, Inc., and Lexington Utilities Company, Inc., Based on Operation Reports of the Central Kentucky Natural Gas Company, Inc.

January 4, 1928

Filed with statement of Evidence under Equity Rule No. 75(b).

Filed Oct. 28, 1933.

Ford, Bacon & Davis, Incorporated, Engineers, New York, Philadelphia, New Orleans, Chicago, San Francisco.

[fol. 41]

Central Kentucky Natural Gas Co., Inc., Lexington Utilities Co., Inc.

Summary of Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance, and Contingencies

	Entire system	Lexington district
Estimated Annual Allowance Necessary for Amortization and Depletion:		
Central Kentucky Natural Gas Co., Inc.	$146,603	$82,477
Lexington Utilities Co., Inc.	12,191	12,191
Total	$158,794	$94,668
Estimated Annual Allowance Necessary for Extraordinary Maintenance:		
Central Kentucky Natural Gas Co., Inc.	$25,090	$12,878
Lexington Utilities Co., Inc.	8,384	8,384
Total	$33,474	$21,262
Estimated Annual Allowance Necessary for Contingencies:		
Central Kentucky Natural Gas Co., Inc.	.....	.....
Lexington Utilities Co., Inc.	.....	.....
Total	$10,000	$5,600
Total Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies	$202,268	$121,530

[fol. 42] Estimated Annual Allowance Necessary for Amortization and Depletion

A natural gas utility differs from other public utilities in that it is not a continuing operation. There is no replenishment of the supply of the commodity and the service life of the natural gas utility is limited by the available supply of natural gas. With exhaustion of the gas fields, the utility must cease to function. Because of this condition, the rates for natural gas should include, as one element, an amount which will permit the Company to recover the value of its property used in public service.

In estimating the annual allowance necessary for amortization and depletion, an amortization period of 20 years has been used for all amortizable property, except for certain unites of property which, obviously, have a life of less than twenty years. The use of a twenty-year amortization period is based on the following three considerations:

(a) It is a longer period of time than any conservative banker would consider for sinking fund purposes on securities issued against a natural gas enterprise.

(b) It is impossible to foretell with any very great degree of accuracy the life of the natural gas fields of West Vir-

ginia and Kentucky. Their life is dependent not only upon the gas content of the present known fields, but also on the rate of withdrawal and the possible discovery of new fields. Thus an estimate which at the best must be very speculative, should not exceed twenty years.

(c) The franchise in Lexington is for a twenty-year period.

[fol. 43] The annual amortization allowance is based on a 3½ per cent sinking fund. This results in an annual sum which, invested at 3½ per cent, will yield the amortizable value of the property at the end of twenty years.

The amortizable value, as shown on the following statements, is the estimated reproduction cost new less deterioration as of December 31, 1926, less the estimated net salvage value at the end of the amortization period. The estimated net salvage value represents the amount which can be realized on the pipe lines, compressing stations and other unites of property, giving effect to the cost involved in salvaging that property. With respect to the distribution systems in the several communities served, it is estimated that the salvage value, when the Company ceases to operate as a natural gas utility, will be 50 per cent of the estimated reproduction cost new as of December 31, 1926, it being assumed that the Company will be able to dispose of its distribution systems at that value to some successor artificial gas company.

The amortization period for the Red Bush Field is estimated to be two years, based on the rate of decline in rock pressure in this field. The remaining life of the Red Bush Compressing Station and Branch Line is estimated to be six years, based on the assumption that the compressing station and pipe line will be used to handle gas purchased in the vicinity for four years after the Red Bush wells are depleted. The Johnson-Magoffin Branch Line transports purchased gas to the main line, and its estimated amortization period of eight years gives effect to the probable depletion of this territory.

[fol. 44] The estimated annual allowance for amortization and depletion has been allocated to the Lexington District as shown on the following statements.

Annual amortization and depletion allowance for production system property were allocated to Lexington on a gas sales basis which resulted in 56.42 per cent being assigned to the Lexington District.

This basis of allocation was also used for the transportation system amortization charges, with the exception of rights of way and pipe on the main line from Inez to Lexington. Allocation of annual amortization charges for these two classes of property took into consideration that the section of the line east of the Mount Sterling Branch Line is used to transport gas to all consumers of the Central Kentucky Natural Gas Company; that the section between the Mount Sterling Branch Line and Winchester is used to transport gas to all consumers except those in Mount Sterling; that the section of the line between Winchester and the Paris Branch Line is used to transport gas to all consumers except those in Mount Sterling and Winchester, and that the section of the line from the Paris Branch Line to Lexington is used to transport gas to consumers in Lexington and to the Frankfort Natural Gas Company. An accompanying statement shows the detailed derivation of the allocation percentages, resulting in a composite figure of 60.32 per cent of the amortization charges, for rights of way and pipe on the main line, allocated to the Lexington District.

Annual amortization charges for distribution system property required no allocation since the location of this property determined the amounts applicable to the Lexington District.

[fol. 45] Annual amortization charges for general property were allocated on the basis of gas sales, that is 56.42 per cent to the Lexington District.

The annual amortization charge for organization costs was allocated to the Lexington District on the basis of gas sales.

Annual amortization charges for construction overheads, including cost of financing were prorated to the Lexington District in the ratio that the property used and useful for service in the Lexington District bore to the entire property of the Central Kentucky Natural Gas Co., Inc.

The annual allowance for amortization of going concern value was allocated partly in the ratio of the number of consumers in the Lexington District to the total number of consumers on the system, and partly in the ration that obtained for all physical property.

Annual amortization charges for the cost of obtaining new franchises were allocated to the Lexington District on the basis of the number of consumers.

Central Kentucky Natural Gas Co., Inc.

Estimated Annual Allowance Necessary for Amortization and Depletion

Item	Estimated reproduction cost new less deterioration as of Dec. 31, 1926	Estimated net salvage	Remaining life (years)	Annual allowance for amortization and depletion on 3½ per cent sinking fund basis — Entire system: Rate	Entire system: Amount	Lexington district: Basis of allocation	Lexington district: Amount
Organization Costs	$101,600	.....	20	3.54%	$3,597	Gas Sales—56.42%	$2,029
Production System Property:							
Menifee Field:							
Leaseholds	1,975	.....	20	3.54	70	Gas Sales—56.42%	40
Stored Gas	409,663	409,663		.....	.....	.....	.....
Rights of way	4,971	.....	20	3.54	176	Gas Sales—56.42%	99
Gas Wells	110,240	8,200	20	3.54	3,612	" —56.42%	2,038
Field Lines	166,486	10,000	20	3.54	5,540	" —56.42%	3,125
Other Equipment	532	50	20	3.54	17	" —56.42%	10
Total Menifee Field	$693,867	.....			$9,415		$5,312
Red Bush Field:							
Leaseholds	$3,575	.....	2	49.14	$1,757	Gas Sales—56.42%	$991
Measuring Station Structures	699	.....	2	49.14	343	" —56.42	193
Measuring Station Equipment	3,722	1,800	2	49.14	944	" —56.42	533
Gas Wells	21,925	5,800	2	49.14	7,924	" —56.42	4,471
Field Lines	35,939	2,200	2	49.14	16,579	" —56.42	9,354
Total Red Bush Field	$65,860	.....	..	.....	$27,547	.....	$15,542
Total Production System Property	$759,727	.....	..	.....	$36,962	.....	$20,854
Transmission System Property							
Menifee Compressing Station:							
Land owned in Fee	$100	100	20	3.54	.....	.....	.....
Structures	26,784	5,000	20	3.54	$771	Gas Sales—56.42%	$435
Stable Equipment	210	.....	9	9.65	20	" —56.42	11

Equipment	117,613	3,150	20	3.54	4,052	" —56.42	2,286
Total Menifee Compressing Station	$144,707				$4,843		$2,732
[fol. 47]							
Red Bush Compressing Station:							
Structures	$13,184	$2,000	6	15.27%	$1,708	Gas Sales—56.42%	$964
Equipment	50,155		6	15.27	7,659	" 56.42	4,321
Total Red Bush Compressing Station	$63,339				$9,367		$5,285
Main Line—Inez to Lexington:							
Measuring Station Equipment	$499	200	20	3.54	$11	Gas Sales—56.42%	$6
Rights of Way	30,240		20	3.54	1,070	" —60.32%	645
Pipe Lines	1,189,484	60,000	20	3.54	39,984	" —60.32	24,119
Total Main Line	$1,220,223				$41,065		$24,770
Red Bush Branch Line:							
Right of Way	$734		6	15.27	$112	Gas Sales—56.42%	$63
Pipe Line	16,730		6	15.27	2,555	" —56.42	1,442
Total Red Bush Branch Line	$17,464				$2,667		$1,505
Johnson-Magoffin Branch Line:							
Rights of Way	$1,261		8	11.05	$139	Gas Sales—56.42%	$78
Pipe Line	28,269		8	11.05	3,124	" —56.42	1,763
Total Johnson-Magoffin Branch Line	$29,530				$3,263		$1,841
Mt. Sterling Branch Line:							
Rights of Way	$1,353		20	3.54	$48		
Pipe Line	24,017	1,600	20	3.54	794		
Total Mt. Sterling Branch Line	$25,370				$842		

Estimated Annual Allowance Necessary for Amortization and Depletion

Item	Estimated reproduction cost new less deterioration as of Dec. 31, 1926	Estimated net salvage	Remaining life (years)	Annual allowance for amortization and depletion on 3½ per cent sinking fund basis — Entire system: Rate	Entire system: Amount	Lexington district: Basis of allocation	Lexington district: Amount
Paris Branch Line:							
Measuring Station Equipment	$478	200	20	3.54	$10		
Regulators	727		20	3.54	26		
Regulator Structures	216		20	3.54	8		
Pipe Line	67,639	7,500	20	3.54	2,129		
Total Paris Branch Line	$69,060				$2,173		
[fol. 48]							
Telephone Lines	$21,030		20	3.54%	$744	Gas Sales—56.42%	$420
Total Transmission System Property	$1,590,723				$64,964		$36,553
Distribution System Property:							
Lexington Suburbs:							
Land Owned in Fee	900	900	20	3.54			
Structures	1,232		20	3.54	$44	Location	$44
Mains	50,685	25,599	20	3.54	889	"	889
Services	9,950	5,025	20	3.54	174	"	174
Meters	10,303	6,061	20	3.54	150	"	150
Regulators	3,678		20	3.54	130	"	130
Office Furniture and Fixtures	4,853	2,769	20	3.54	74	"	74
Automobiles and Trucks	2,153	1,275	20	3.54	31	"	31
Total Lexington Suburbs	$83,754				$1,491		$1,491

Winchester:							
Land owned in Fee	560	560	20	3.54			
Structures	989		20	3.54	$35		
Mains	63.565	38.759	20	3.54	878		
Services	16.848	10.273	20	3.54	233		
Meters	25.730	15.136	20	3.54	373		
Regulators	2.939		20	3.54	104		
Office Furniture and Fixtures	1.082	744	20	3.54	12		
Automobiles and Trucks	559	400	20	3.54	6		
Tools	410		20	3.54	15		
Total Winchester	$112.682				$1.658		

[fol. 49]

Distribution System Property (Concluded)

Mt. Sterling:							
Land Owned in Fee	$300	$300	20	3.54	$		
Structures	618		20	3.54	22		
Mains	$36.862	20.479	20	3.54	580		
Services	9.858	5.476	20	3.54	155		
Meters	13.461	7.919	20	3.54	196		
Regulators	1.670		20	3.54	59		
Office Furniture and Fixtures	1.052	690	20	3.54	13		
Automobiles and Trucks	1.631	889	20	3.54	26		
Tools	410	228	20	3.54	6		
Total Mt. Sterling	$65.862				$1.057		
Total Distribution System Property	$262.298				$4.206		$1.491

Central Kentucky Natural Gas Co., Inc.—Continued

Estimated Annual Allowance Necessary for Amortization and Depletion

Item	Estimated reproduction cost new less deterioration as of Dec. 31, 1926	Estimated net salvage	Remaining life (years)	Annual allowance for amortization and depletion on 3½ per cent sinking fund basis — Entire system Rate	Entire system Amount	Lexington district Basis of allocation	Lexington district Amount
General Property							
Office Furniture and Fixtures (Oil City, Pa.)	$1,509		20	3.54	$53	Gas Sales—56.42%	$30
Construction Overhead Costs							
Engineering during Construction	$125,557				$6,353	Prorated	$3,428
Legal Expenses during Construction	38,298				1,797	"	957
Administration Expenses during Construction	59,258				2,755	"	1,479
Taxes, Insurance and Damages during Construction	25,532				1,198	"	638
Interest during Construction	177,870				9,000	"	4,840
Total	$426,515				$21,103		$11,342
Cost of Financing	146,028		20	3.54	$5,169	Prorated	$2,800
Miscellaneous Intangible Capital							
Going Concern Value	$248,000		20	3.54	$8,779	Consumers and Property	$6,079
Cost of Obtaining New Franchises	50,000		20	3.54	1,770	Consumers	1,299
Total	$298,000				$10,549		$7,378

[fol. 50]

Working Capital							
Materials and Supplies	$6,551	$6,551					
Cash Required for Operation	76,449	76,449					
Total	$83,000	$83,000					

Total Central Kentucky Natural Gas Co., Inc.	$3,669,400				$146,603		$82,477
[fol. 51]							
Organization Costs	$26,650	$	20	3.54%	$943	Location	$943
Distribution System Property							
City of Lexington:							
Land Owned in Fee	1,920	1,920	20	3.54		Location	
Structures	1,939		20	3.54	69	"	69
Regulators Structures	1,415	817	20	3.54	21	"	21
Mains	290,674	158,080	20	3.54	4,694	"	4,694
Services	72,702	40,167	20	3.54	1,152	"	1,152
Meters	106,669	62,747	20	3.54	1,555	"	1,555
Regulators	5,134		20	3.54	182	"	182
Other Equipment	713	468	20	3.54	9	"	9
Total Distribution System Property	$481,166				$7,682		$7,682
Construction Overheads							
Engineering during Construction	$20,347				$720	Location	720
Legal Expenses during Construction	8,043				255	"	255
Administration Expense during Construction	10,724				341	"	341
Taxes, Insurance and Damages during Construction	5,362				170	"	170
Interest during Construction	33,138				1,167	"	1,167
Total Construction Overheads	$77,614				$2,653		$2,653
Cost of Financing	25,797		20	3.54	913	"	913
Total Lexington Utilities Co., Inc.	$611,227				$12,191		$12,191

[fol. 52] Estimated Annual Allowance Necessary for Extraordinary Maintenance

In order to keep the property in the best operating condition, with the least distortion to net earnings from year to year, provision should be made annually for extraordinary repairs and replacements in addition to ordinary maintenance. This provision is to cover such expenditures as the replacement of pipe, re-rubbering the Dresser couplings, and other unforeseen expenditures which, if not provided for annually, may seriously cripple the Company when it is confronted with large expenditures of this character in a single year. These estimated amounts are necessary only to keep the property in good opertaing condition and they are not considered sufficient to permit of the creation of a reserve. In other words, over a period of years it is anticipated that the expenditures will equal these allowances, and when natural gas is no longer available the property will then be in substantially the same physical condition as at the present time.

As shown on the following statement the allowances for extraordinary maintenance are made for structures, compressing station equipment, pipe lines, telephone lines, furniture and fixtures, automobiles and engineering and interest during construction.

The estimated annual allowance for extraordinary maintenance has been allocated to the Lexington District as follows:

(a) For production system property on a basis of gas sales.

[fol. 53] (b) For transmission system property on a basis of gas sales giving effect to the use which is made of the various parts of the main transmission line.

(c) For distribution system property on a basis of location.

(d) For engineering during construction and interest during construction, on a basis of the ratio which obtained for all other property.

[fol. 54] Central Kentucky Natural Gas Co., Inc.

Estimated Annual Allowance Necessary for Extraordinary Maintenance

Transmission System Property	Estimated reproduction cost new as of Dec. 31, 1926	Annual allowance for extraordinary maintenance: Entire system Per cent	Entire system Amount	Lexington district Basis of allocation	Lexington district Amount
Menifee Compressing Station:					
Structures	$32,796	1.0%	$328	Gas Sales—56.42%	$185
Equipment	152,165	1.0	1,522	" —56.42	859
Total Menifee Compressing Station	.....	.....	$1,850	.....	$1,044
Red Bush Compressing Station:					
Structures	$14,759	1.0%	$148	Gas Sales—56.42%	$84
Equipment	54,543	0.5	273	" —56.42%	154
Total Red Bush Compressing Station	.....	.....	$421	.....	$238
Main Line—Ines to Lexington:					
Pipe Line	$1,351,686	1.0%	$13,517	Gas Sales—60.32%	$8,153
Total Main Line	.....	.....	$13,517	.....	$8,15
Red Bush Branch Line:					
Pipe Line	$17,071	1.0%	$171	Gas Sales—56.42	$96
Total Red Bush Branch Line	.....	.....	$171	.....	$96
Johnson-Magoffin Branch Line	$28,846	1.0%	$288	Gas Sales—56.42%	$163
Pipe Line	.....	.....	.....	.....	.....
Total Johnson-Magoffin Branch Line	.....	.....	$288	.....	$163

Central Kentucky Natural Gas Co., Inc.—Continued

Estimated Annual Allowance Necessary for Extraordinary Maintenance

	Estimated reproduction cost new as of Dec. 31, 1926	Annual allowance for extraordinary maintenance			
		Entire system		Lexington district	
		Per cent	Amount	Basis of allocation	Amount
Mt. Sterling Branch Line:					
Pipe Line	$24,507	1.0%	$245		
Total Mt. Sterling Branch Line			$245		
Paris Branch Line:					
Regulator Structures	$271	2.0%	$5		
Pipe Line	68,322	1.0	683		
Total Paris Branch Line			$688		
Telephone Line	$26,288	2.0%	526	Gas Sales—56.42%	$279
Total Transmission System Property			$17,706		9,991
[fol. 55]					
Distribution System Property					
Lexington:					
Structures	$1,349	2.0%	$27	Location	$27
Mains outside City Limits	51,197	2.0	1,024	"	1,024
Services outside City Limits	10,050	2.0	201	"	201
Office Furniture and Fixtures	5,538	2.0	111	"	111
Automobiles and Trucks	2,550	20.0	510	"	510
Total Lexington			$1,873		$1,873

Winchester:				
Structures	1,117	2.0%	$22	
Mains	77,518	2.0	1,550	
Services	20,546	2.0	411	
Office Furniture and Fixtures	1,488	2.0	30	
Automobiles and Trucks	799	20.0	160	
Tools	456	2.0	9	
Total Winchester			$2,182	
Mt. Sterling:				
Structures	$732	2.0%	$15	
Mains	40,958	2.0	819	
Services	10,953	2.0	219	
Office Furniture and Fixtures	1,380	2.0	28	
Automobiles and Trucks	1,777	20.0	355	
Tools	456	2.0	9	
Total Mt. Sterling			$1,445	
Total Distribution System Property			$5,500	$1,873
General Overhead Costs:				
Engineering during Construction	$131,011		$464	250
Interest during Construction	199,115		1,420	764
Total General Overheads			1,884	$1,014
Total Central Kentucky Natural Gas Co., Inc			$25,090	$12,878

[fol. 56]

Lexington Utilities Co., Inc.—Continued

Estimated Annual Allowance Necessary for Extraordinary Maintenance

Item:	Estimated reproduction cost new as of Dec. 31, 1926	Annual allowance for extraordinary maintenance			
		Entire system		Lexington district	
		Per cent	Amount	Basis of allocation	Amount
Distribution System Property:					
Lexington, Ky.:					
Structures	$3,669	2.0%	$73	Location	$73
Regulator Structures	1,633	2.0	33	"	33
Mains	316,159	2.0	6,323	"	6,323
Services	80,334	2.0	1,607	"	1,607
Other Equipment	935	2.0	18	"	18
Total Distribution System Property	.....	.....	$8,054		$8,054
Construction Overheads:					
Engineering during Construction	$21,447	.....	$81	Location	$81
Interest during Construction	36,505	.....	249	"	249
Total Construction Overheads	.....	.....	$330		$330
Total Lexington Utilities Co., Inc.	.....	.....	$8,384		$8,384

[fol. 57] Central Kentucky Natural Gas Company, Inc.

Calculation of Percentages Used to Allocate Rights of Way and Pipe on Main Line—Ines to Lexington

Location	Length of line (Ft.)	Cost @ $2.288 per (Ft.)	Lexington District Gas Sales (Per Cent)	Lexington District Gas Sales Amount
Ines to Mt. Sterling Branch Line	428,637	$980,721	56.42%	$553,323
Mt. Sterling Branch Line to Winchester	72,636	166,191	60.96	101,310
Winchester to Paris Branch Line	11,847	27,106	70.69	19,161
Paris Branch Line to Lexington	77,652	177,668	79.70	141,601
Total	590,772	$1,351,686		$815,395
Per Cent of Total		100.00%		60.32%

Calculation of Gas Sales Percentages Applicable to the Four Sections of the Main Line—Ines to Lexington

Mt. Sterling Branch Line to Winchester (Serves Lexington, Winchester and Wholesale Consumers)

	4 Year Sales (M. c. f.)	Per Cent of Total
Lexington	5,145,115	60.96%
Winchester	1,162,793	13.78
Wholesale	2,132,791	25.26
Total	8,440,699	100.00%

Paris Branch Line to Lexington (Serves Lexington and Frankfort)

	4 Year Sales (M. c. f.)	Per Cent of Total
Lexington	5,145,115	79.70%
Frankfort	1,310,676	20.30
Total	6,455,791	100.00%

Winchester to Paris Branch Line (Serves Lexington and Wholesale Consumers)

	4 Year Sales (M. c. f.)	Per Cent of Total
Lexington	5,145,115	70.69%
Wholesale	2,132,791	29.31
Total	7,277,906	100.00%

[fol. 58] Clerk's certificate to foregoing exhibit omitted in printing.

[fol. 59] Sections 8, 24 and 25 of Franchise Ordinance

Sec. 8. The board shall personally, or through such assistants as it may employ or designate, have at all times access to all or any of the property owned or used in part or in whole by the Company for the purpose of producing, transmitting, distributing, furnishing or selling natural, manufactured or mixed gas in the City of Lexington. In

like manner the Board or its assistants may at all times enter in or upon said property to inspect or examine it and may inspect, examine and verify all or any of the accounts, books, records, contracts, documents or papers of the Company. Any person other than a member of the Board shall upon demand of the Company produce his authority from the Board.

[fol. 60] Sec. 24. The Company hereby agrees and binds itself by the acceptance of this franchise to take all reasonable means and measures necessary to furnish an adequate supply of natural gas to the City of Lexington and its inhabitants at all times during the term of this franchise. When it shall appear to the Company that it may, because of conditions beyond its control, become unable to furnish natural gas in sufficient quantities to meet the demands of the City and its inhabitants at all times and that it will become necessary to use manufactured gas to supplement the natural gas supply, the Company shall give written notice to the Board and shall file therewith a statement setting forth fully the facts in relation to the supply of natural gas, the proposed proportion of manufactured gas to be mixed with natural gas, the heating value of the mixed gas to be furnished, the pressure at which it will be distributed, and the time when said mixed gas service will be available, together with a schedule of proposed rates, charges or compensation for said mixed gas service which it claims will be just and reasonable rates, charges or compensation for mixed gas. If the parties are unable to agree as to whether the supply of natural gas is insufficient to meet the demand in Lexington at all times and that manufactured gas must be used to augment said supply, or as to the proportion of manufactured gas to be mixed with natural gas, or as to the pressure, or as to the heating [fol. 61] value requirements, or as to date when such mixed gas may be used, or as to the rates and charges for such mixed gas, then the parties shall proceed as provided in Section 201e-1 to 201e-20, inclusive, of the Kentucky Statutes, or in such manner as the law may then provide.

Sec. 25. The Company hereby agrees and binds itself by the acceptance of this franchise to take all reasonable means and measures necessary to furnish an adequate supply of mixed gas to the City of Lexington and the inhabitants thereof at all times during the remainder of the term of

this franchise. Whenever it shall appear to the Company that it may, because of conditions beyond its control, become unable to furnish mixed gas in sufficient quantities to meet the demands of the City and its inhabitants at all times, and that it will become necessary to use manufactured gas exclusively, the Company shall give written notice thereof to the Board and shall file therewith a statement setting forth fully the facts in relation to the supply of mixed gas, the character of the manufacured gas which it proposes to supply, the heating value thereof, the time when said manufactured gas will be available, the pressure at which it will be distributed, together with a schedule of proposed rates, charges or compensation for said manufactured gas which it claims will be just and reasonable rates, charges or compensation for manufactured gas. If the parties are unable to agree as to whether the supply of mixed gas is insufficient to meet the demand in Lexington at all times and that manufactured gas must be used exclusively, or as to the date from and after which manufactured gas may be distributed and sold in the City of Lexington, or as to the rates and charges for manufactured gas, or as to the pressure or heating value requirements of said manufactured gas, then the parties shall proceed as provided in Sections 201e-1 to 201e-20, inclusive, of the Kentucky Statutes, or in such other manner as the law may then provide.

[fol. 62] IN THE SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Oct. 30, 1933

To Charles Elmore Cropley, Clerk United States Supreme Court, Washington, D. C.:

The Appellees, Mrs. George Hignight and others, request and direct you to have printed the following portions of the record which they have caused to be certified by the Clerk of the United States District Court, for the Eastern District of Kentucky, and filed herein, as follows, to-wit:

1. All of the record designated in the Præcipe.

2. All of the record included in the amendments to the Appellant's Statement of Evidence, together with the Exhibits thereto attached.

3. Sections 8, 24 and 25 of the Franchise Ordinance heretofore filed and appearing in the transcript filed by the Appellant herein.

Dated October 27, 1933.

J. A. Edge, Attorney for Mrs. George Highnight and Others, Appellees.

Service of the aforesaid designation or parts of the record to be printed is hereby accepted this 27th day of October, 1933.

D. L. Hazelrigg, Henry T. Duncan, Attorneys for the Central Kentucky Natural Gas Company. Robert H Winn and Clinton M. Harbison, B. P. Wootton, Attorneys for Railroad Commission et al.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY, APPELLANT,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION; BAILEY P. WOOTON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY; CITY OF LEXINGTON, A MUNICIPAL CORPORATION, AND S. B. FEATHERSTON, INDIVIDUALLY AND AS REPRESENTING ALL OTHER PERSONS SIMILALY SITUATED.

STATEMENT OF JURISDICTION.

Pursuant to Supreme Court Rule 12, paragraph 1, Central Kentucky Natural Gas Company, the above appellant, files this its statement showing the basis on which it contends that the Supreme Court has ap-

pellate jurisdiction to review on appeal the decree appealed from herein:

I.

The statutes believed to sustain appellate jurisdiction are as follows:

(1) Sec. 24 of the United States Judicial Code (28 U. S. C. A., Sec. 41), which provides that

"The District Court shall have original jurisdiction as follows:

"(1) First, of all suits of a civil nature at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *."

(2) Sec. 266 of the United States Judicial Code (28 U. S. C. A., Sec. 380), which provides that whenever an application for a temporary injunction against any officer of a State to restrain the enforcement of an order made by a Commissioner acting under and pursuant to the statutes of such State, the Justice or Judge to whom such application shall be made shall call to his assistance two other Judges, provided that one of such three Judges shall be a Justice of the Supreme Court or a Circuit Judge, and further providing that an appeal may be taken direct to the Supreme Court of the United States from the order of such court granting or refusing in its final decree a permanent injunction in such suit.

II.

This action is of a civil nature in equity which was filed in the United States District Court for the East-

ern District of Kentucky at Lexington by the plaintiff, seeking to enjoin the members of the Railroad Commission of Kentucky and the Attorney General of said State from enforcing an order entered by said Railroad Commission on October 9, 1929, fixing a rate of 45 cents per M. cubic feet for gas furnished by the plaintiff to consumers thereof in the City of Lexington under a franchise contract entered into between the plaintiff and said City of Lexington, a municipal corporation, bearing date February 25, 1927, upon the ground that said rate of 45 cents was confiscatory and violated the rights of plaintiff secured to it under Section 1 of the Fourteenth Amendment of the Constitution of the United States providing that,

> "* * *; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

III.

Said Railroad Commission of Kentucky in fixing said rate proceeded under the powers conferred upon it by Chapter 61 of the Acts of the General Assembly of 1920 of the State of Kentucky (now Secs. 201 *e*-1 to 201 *e*-26, Kentucky Statutes, Carrol's 1932 Edition).

IV.

The plaintiff first made application for said injunction to the Honorable A. M. J. Cochran, Judge of said U. S. District Court for the Eastern District of Kentucky, but said Judge declined to sit therein on the

ground of being disqualified, and thereupon the plaintiff made and presented said application to the Honorable Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky, who thereupon organized a statutory three-judge court by calling to his assistance the Honorable Charles H. Moorman and Honorable Smith Hickenlooper, Circuit Judges, both of whom are members of the United States Circuit Court of Appeals for the Sixth District.

V.

The decree sought to be reviewed was entered by said court organized as aforesaid, on September 22, 1932.

VI.

The application for the appeal herein was presented to said court on the 19th day of December, 1932.

VII.

By its decree said court found that said Commission rate of 45 cents was invalid, inadequate and confiscatory, but refused to grant a permanent injunction against the enforcement of said rate by reason of plaintiff's refusal to consent to a distribution of the fund impounded under the temporary rates fixed by the franchise contract on the basis of 50 cents per M. cubic feet for gas as a reasonable rate.

VIII.

The question of jurisdiction in this action was considered by said court on the motion filed by the ap-

pellees (defendants below) to dismiss the action for want of jurisdiction. Said motion was overruled, and the opinion of said court on the question of jurisdiction is published in 37 Fed. (2d) 938. The statement of the facts of this cause as set out in said opinion and the authorities therein referred to are believed by appellant to sustain the jurisdiction of said court and of the Supreme Court of the United States.

Dated December 20th, 1932.

(Signed) D. L. HAZELRIGG,
CHESTER J. GERKIN,
HENRY T. DUNCAN,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY,

Appellant,

v.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, and JAMES HATCHER, Members Constituting said Railroad Commission, BAILEY P. WOOTTEN, Attorney General of the Commonwealth of Kentucky, CITY OF LEXINGTON, a Municipal Corporation, and S. B. FEATHERSTON, individually and as representing all other persons similarly situated,

Appellees.

BRIEF FOR APPELLANT

Jurisdiction

The company, pursuant to Rule 12, paragraph 1, has filed its statement as to jurisdiction, and this

Court has found that probable jurisdiction has been shown (.... U. S. ....; Order entered March 27, 1933). No opposing statement as to jurisdiction has been filed.

Statement of the Case

1—The Parties

The appellant, Central Kentucky Natural Gas Company, is a Kentucky corporation, engaged in the business of producing, purchasing and marketing natural gas. The appellee, City of Lexington, is a municipal corporation of Kentucky. The appellee, S. B. Featherston, is a gas consumer appearing for himself and other consumers generally. The appellee, Bailey P. Wootten, is the Attorney General for the Commonwealth of Kentucky. The remaining appellees are members of the Railroad Commission of Kentucky.

2—How a Franchise May Be Obtained

Under the Kentucky Constitution the streets of a city can not be used by a public service corporation without the consent of the city's legislative board (Kentucky Constitution, Section 163, Appendix, p. 90), such privilege can not be granted for more than twenty years, and must be sold at public auction to the highest and best bidder (Kentucky Constitution, Section 164, Appendix, p. 90).

3—Conditions Existing Under Former Franchise

The appellant obtained a twenty year franchise in 1905 from the City of Lexington to use the streets for its mains and equipment in supplying natural gas. This franchise

expired September 5, 1925. Negotiations for a new franchise followed, and resulted in the adoption by the city of Ordinance No. 3346 (R. 31 to 40), authorizing the Mayor to sell at public auction a twenty year franchise on the terms and conditions of said ordinance. This ordinance, referred to as the Franchise Contract, was adopted on January 28, 1927. The terms of the ordinance were the result of advance agreement between the city and the company, and was drawn to fit the situation and facts affecting appellant. The franchise was sold at public auction, and appellant's bid was accepted by the city on February 25, 1927, upon which date the franchise contract became effective (R. 4).

The city and the company were unable to agree on rates and for that reason the franchise contract merely provided for just and reasonable rates and charges, Section 4(A) (R. 32), but provided the method for fixing rates, Sections 4(B) to 4(E) inclusive (R. 32-33).

After the company acquired the original franchise in 1905, it built a main ten-inch transmission line to the gas field owned by it in Menifee County, Kentucky. In November, 1912, by reason of the rapid depletion of this field the company entered into a twenty-year contract (R. 177) with the United Fuel Gas Company, a West Virginia corporation, to deliver gas to the company at Inez, Kentucky (near the West Virginia boundary) and extended its ten-inch main to that point in order to receive this gas.

Subsequently the company entered into contracts with other companies owning gas fields along its main transmission line for delivery of gas at various points (R. 177). In 1922 the company acquired leases on various gas lands in Lawrence County, Kentucky, known as the Red Bush field (R. 118a).

The company had been unable to furnish gas through its ten-inch line in sufficient quantities to meet peak demands in very cold weather, causing much inconvenience, discomfort and dissatisfaction. During the negotiations for the new franchise the insufficiency of its main line was stressed. In the meantime Petroleum Exploration, a corporation, had discovered and developed a considerable gas field in Owsley County, Kentucky, about fifty miles from Lexington.

4—The New Franchise and Its Provisions

For the purpose of compelling the company to secure this additional supply of gas the city wrote into the franchise ordinance Section 23 (R. 36) requiring the company purchasing the franchise, if it already had a ten-inch main transmission line (this applied to appellant) to begin within six and complete within nine months thereafter an additional line to adequate sources of supply in Kentucky or West Virginia so as to enable it to comply with the franchise requirements. This obligation was expressly made *"a condition upon which the franchise was granted"* and it was *"especially reserved and provided that should the company fail to have said two pipe lines constructed and supplying gas as is herein provided, the city, may upon six months written notice to the company, declare this contract at an end."**

The franchise requirement particularly referred to in Section 23 is set out in Section 22 which imposes on the company the duty to furnish gas *"at all times at a uniform and adequate pressure at the outlet of each customer's meter."* *"From and after the time when the com-*

* Unless otherwise noted italics used in this brief are ours.

*pany is furnishing gas through * * * two pipe lines as provided in Section 23''* (R. 35).

In order to better insure the fulfillment of the above obligation, Section 22 contained special provisions as to pressure gauges, and Section 27 (R. 37) imposed heavy penal obligations and created civil liabilities for the violation of this or any other condition of the contract.

As above stated the ordinance provided the procedure whereby the just and reasonable rates and charges guaranteed under Section 4(A) should be determined. First, the company was to promulgate its rates, Section 4(B). Second, if not satisfied with these rates (and it was known in advance the city would not be, because the parties had not been able to agree on rates), the city was to proceed by complaint before the Railroad Commission as provided by Statute (Kentucky Statutes, 201e-14, Appendix p. 92). Third, if not satisfied with the Commission rates resort could be had to the courts for relief against them, *and for a determination of reasonable rates for the purpose of distributing the impounded fund,* Section 4(E), (R. 32).

The question of temporary rates, and the protection of the mutual rights and equities pending the final fixation of rates by the Commission, or thereafter by the Court, was a matter of prime importance and the method whereby this could be accomplished was provided in Section 4(E) (R. 32). The temporary rates agreed upon were 50 cents per M.c.f. until the company was furnishing gas through two pipe lines as provided in Section 23, and after that 60 cents. Out of each of these rates 10 cents was to be impounded, and remain under the control of the Commission or Court "until the final fixation of just and reasonable rates," by the Commission or Court, after which the funds

so impounded were to be distributed under the orders of the Commission or Court "as the final determination may direct" (R. 33).

The contract further provided in Section 7 (R. 34) that the rates and charges fixed by the Commission (in the event they were accepted as satisfactory) should continue without change for three years after the commission's order. But if the question of rates should be taken to Court, then the "fixation" of rates "by the highest Court to which the same may be taken," should continue as the lawful and contract rates for two years after "the final determination." By virtue of the terms of the Franchise Contract it was essential for the court to determine, first, whether the commission rate was confiscatory, and if found to be so to enjoin its enforcement; second, whether the company rates were reasonable and if found to be so to render judgment ordering the impounded monies paid to the company; third, if the company rates were found to be excessive then *to ascertain and fix reasonable rates and charges* and distribute the impounded money accordingly.

While the parties fully realized that the court could not declare a future rate (that being a legislative function), yet, of necessity, the question of reasonable compensation for a past service was involved in the disposition of the impounded funds and it would be the function of the Court to determine how that should be done. For the period of two years following the final decree, the rate, on the basis of which the impounded money was distributed by the court, would become the agreed or contract rate and not subject to change.

Pursuant to the franchise contract, Section 4(B) (R. 32), the company promulgated its rates on February 26, 1927

(R. 110). The city filed its complaint before the Railroad Commission on March 25, 1927 (R. 109). The temporary rates of 50 cents and 60 cents for gas furnished subsequent to the contract were collected and a custodian was appointed to receive the impounded money (R. 110). Testimony was first introduced before the commission on March 15, 1928 (R. 110), more than a year after the effective date of the franchise contract, and about four months after the company was furnishing gas through the second pipe line (R. 184), at which time the temporary rate went from 50 cents to 60 cents (December 1, 1927).

5—Company Fulfills Contract Requirement for Second Pipe Line

Immediately following the making of the franchise contract the company entered into a contract (as contemplated) with Petroleum Exploration (March 24, 1927) for the construction by that company of a second pipe line from Lexington to its gas field in Owsley County, Kentucky (R. 178 to 183). Under that contract the company agreed to purchase a minimum of 750,000,000 cubic feet of gas delivered at Lexington at 40 cents per M.c.f. This line was completed and the appellant began furnishing gas through the same in November, 1927 (R. 184), and on December 1, 1927, the temporary rate of 60 cents went into effect in accordance with Section 4(E) (R. 32). In providing for an increase in the temporary rate to 60 cents after the company should be furnishing gas through two pipe lines it is obvious that the parties did not anticipate a determination by the commission of the reasonableness of the company's rates until after the temporary rate of 60 cents would be in force, and that necessarily the Commis-

sion could not determine just and reasonable rates under the Franchise Contract without taking into consideration and giving effect to the performance by the company of its obligation under Section 23.

6—Hearings Before Railroad Commission

Hearings from time to time were had before the commission until June 28, 1929, at which time the case was submitted, and on October 9, 1929 the commission entered its rate order (R. 12). Before the order was entered the company filed its motion requesting the commission to find the various necessary and basic facts of value, etc. (R. 6 to 11), on which it predicated a rate. This motion was overruled, and the Commission refused to make any findings of fact whatever (R. 11).

In its order (R. 12 to 14) the commission specifically recognized that the rate question arose solely under the franchise contract, and declared, (1) that the company's promulgated rates were excessive, (2) that a flat rate of 45 cents was reasonable, and fixed the same as the rate "*from and after* * * * (*the effective date of the franchise contract*) and until such charge or rate may be otherwise fixed by law or by the agreement of parties" (R. 12).

After reciting in clause "Fourth" of the order "that the commission had conformed its procedure as near as might be to the agreements of the said franchise contract" the order stated:

> "That it is provided in Section 4(E) of said franchise contract that pending the final determination of just and reasonable rates and charges by this Commission and including any subsequent proceedings in Court, the defendant company shall have the

right to charge not to exceed sixty (60) cents per thousand cubic feet for its gas; and that in order to afford either side hereto the right, if it be so desired, to proceed in the courts with respect to such fixation of rates, the application of the forty-five cent rate hereby fixed is suspended for a period of thirty (30) days from the entry of this order; that if within said thirty day period either side shall have filed such proceeding in court, then the application of the forty-five cent rate hereby fixed shall be suspended until there be a final fixation in court of said rates and subject to such modification, if any, of said rate as may be fixed by said Court or Courts; but that if no such proceeding be filed in said time, then the said forty-five cent rate shall at once be put into force and effect'' (R. 13).

7—Proceedings in Court

Considering itself aggrieved by the commission order and that the 45 cent rate was confiscatory, the company instituted this action on October 19, 1929. A temporary restraining order was granted against the enforcement of the rate and also of the provision in Clause Fifth (b) requiring the company to file the statement therein mentioned (R. 42).

The bill of complaint made the usual and necessary allegations showing threatened confiscation and irreparable injury, alleged that the distribution system in the City of Lexington (leased to the company by the Lexington Utilities Company) should be treated as part of the rate base in determining reasonable rates, that any rates less than those promulgated by the company would be confiscatory, and prayed for a temporary and permanent injunction against the enforcement of the 45 cent rate, and that the

court adjudge the impounded funds to belong to the company (R. 29).

The defendants moved to dismiss for want of jurisdiction or equity in the bill of complaint, and pleaded to the merits (R. 44 to 58).

The case was heard on the motion for a temporary injunction and the motion to dismiss, and the court handed down an opinion on January 28, 1930, 37 F. (2d) 938, overruling the motion to dismiss, granting a temporary injunction against the order requiring the company to file the statement above referred to, and refusing to grant a temporary injunction against the enforcement of the rate on the ground that the commission had expressly suspended the order pending proceedings in court (R. 74 to 77).

On March 24, 1930, the cause was submitted on the record made, evidence taken, and briefs filed before the commission (R. 77). On July 21, 1930, an order was entered filing in triplicate (one set for each member of the Court) complete certified copies of the Commission record, testimony, exhibits and briefs, the order setting forth the same in detail (R. 77 to 82).

This detailed statement of exhibits discloses the scope of the testimony covering the company's property, estimates of reproduction cost new less deterioration, operating results over a period of years and under the temporary rate of 50 cents, estimated return under the company's promulgated schedule of rates, maps, copies of pertinent contracts, etc. The testimony of the witnesses comprised eight typewritten volumes. The record was quite voluminous, rendering difficult a complete and accurate comprehension of the details, particularly by a court which had not seen or heard the witnesses (and which did not have

the benefit of a Master's report), which may to some extent account for a misunderstanding of the court which will be pointed out later.

The above detailed statement of the exhibits (R. 77 to 82) shows that for the purpose of this case all of the appraisal witnesses selected as the valuation date December 31, 1926 (Opinion, R. 83), that date having by common consent been mutually adopted because of its proximity to and substantial identity with the effective date of the franchise contract (February 25, 1927), and because there was no change in the property or its value between the two dates. The ultimate question was the determination of just rates for the service furnished under and pursuant to the terms of the Franchise Contract, and it was therefore necessary to determine the rate base as of the date of that contract. These appraisals were brought forward to December 31, 1927 by the witnesses for both parties, but the difference in property value was unimportant.

As furnishing an additional measure or basis for valuing the company's property the city introduced testimony showing the acquisition of the appellant's capital stock by Columbia Gas & Electric Corporation on January 1, 1928 by an exchange of the latter's preferred stock (which had a market value of $2,880,000.00) for the capital stock of the appellant. The court adopted the market value of such preferred stock as the best evidence of the actual value of the company's property and related such value back to December 31, 1926. The court allocated to the Lexington district on the basis of gas sales a value of $1,586,880.

The court found that the Lexington distribution plant, valued at $611,227.00 (leased from the Lexington Utilities Company), should be treated as part of the rate base, and

fixed the sum of the value of the company's property allocated to the Lexington district ($1,586,880.00), and the value of the Lexington distribution system ($611,227.00), amounting to $2,198,107.00, as the rate base (R. 84). No complaint is made of this finding.

The court fixed allowances for amortization and extraordinary maintenance, and refused to make any allowance for contingencies (R. 87, 88). No complaint is made by appellant of these findings.

At the hearing before the commission on March 14, 1928, and April 26, 1928, the appellant presented testimony in Exhibit form reflecting actual operating results under different rates for the years 1922 to 1927, inclusive, and an estimate of return under the company's promulgated rates.

In its opinion the court discussed at some length the figures reflecting the actual operating results for the years 1922 to 1927, inclusive, and also referred to the Kimball estimate of return under the company's promulgated rates. The actual results in 1927 under the temporary rate of 50 cents (60 cents in December), after applying the court's allowances for amortization and extraordinary maintenance, were considered by the court to fairly represent a "minimum return during a normal year by the application of a 50 cent rate," and that such rate would produce "a return of substantially 7% (found by it to be reasonable) on the valuation of $2,198,107" (R. 89). Appellant complains of this conclusion.

The Court failed to grasp the fact that the 1927 operations did not reflect the minimum annual cost of the gas required to be purchased under the Petroleum Exploration contract amounting to $300,000, as delivery of gas under

this contract did not begin until in November of 1927 and the cost of this gas actually delivered in that year was only $47,485.34 (company Exhibit No. 8, p. 14, column 5, R. 165). It was therefore clear that the operating results in 1927 under the temporary 50 cent rate (60 cents in December) did not furnish an accurate basis for testing the sufficiency of the 50¢ rate. The appellant filed its petition for correction (modification) in which the attention of the Court was called to this obvious error. The court overruled this petition in its order entered July 29, 1932 (R. 90). The insufficiency of the reasons given by the court for this action are discussed later in this brief.

Thereafter appellant filed its motion for special findings of fact and conclusions of law (R. 91 to 97). This motion was overruled (R. 98), which ruling is complained of as to certain facts and conclusions of law thereon.

On September 22, 1932, the court entered its decree (R. 98 to 101), refusing to grant a permanent injunction against the commission rate of 45 cents although finding same to be confiscatory, on the ground that the company had declined to accept the court rate of 50 cents as reasonable, and request a distribution of the impounded funds on that basis.

The petition for appeal, together with the company's assignment of errors was filed and allowed on December 20, 1932 (R. 102 to 108).

SPECIFICATION OF ERRORS INTENDED TO BE URGED, AND SUMMARY OF ARGUMENT THEREON

I

Error VII, Point III; Error XI, Point IV; Error IV, Point II; Error IX, Point I

In determining the Company's net income no allowance was made for the Annual Cost ($300,000) of the Gas purchased from Petroleum Exploration under the contract made for the purpose of complying with Section 23 of the Franchise Contract (requiring the Company to furnish gas through two Pipe Lines)

The city admitted the necessity of allowing for the cost of this gas in operating expenses after such cost began on December 1, 1927. There was no controversy between the appellant and the city on this point. Therefore, it was not open to the court to disregard such expense. This error of the court was due at first to an oversight. It refused to make any correction on the ground that delivery of this gas did not begin until in November, 1927, and that "the parties" had requested the court to determine the value of the rate base properties as of December 31, 1926, and it was therefore necessary to determine net income as of that date. Further, that it would be necessary to redetermine the rate base as of a subsequent date if any effect was to be given to a change in operating conditions occurring at a later date.

The "request of the parties" to determine property values as of December 31, 1926, was because that date had been selected by the valuation witnesses as equivalent to

the Franchise Contract date, February 25, 1927, as of which time it was absolutely necessary to determine the rate base because the rate question under the contract began as of that date; and as of which date and for the same reason it was necessary to determine net income in testing the validity of the commission rate. But it was equally necessary to determine the validity of the commission rate over the period to which the commission had applied it, to-wit: From February 25, 1927, the date of the franchise contract to the date of the commission's order, October 9, 1929. During that period there was no substantial change in the value of the property (the parties intending that the value as of December 31, 1926 should be adopted for all purposes) but there was a substantial change in operating conditions caused by the increased cost of gas under the Petroleum Exploration contract which began on December 1, 1927, and simultaneously therewith and because thereof the temporary rate of 50 cents went to 60 cents.

While the court indicated an intention to adhere literally to the date, December 31, 1926, for all purposes, yet in ordering a distribution of the impounded funds the court by necessary implication applied its rate base over the entire collection period and found the commission rate confiscatory over tnat period. If such is the proper construction to be placed on the court's findings and decree then appellant does not insist on the error assigned to the failure of the court specifically to apply the rate base over the period of the rate order, or to find the commission rate confiscatory over that period. The fundamental error was in not determining what rate would be reasonable from and after the cost of the Petroleum Exploration gas began on December 1, 1927 (as of which date the agreed temporary

rate of 60 cents went into effect) to the date of the commission order, October 9, 1929.

II

Error XII, Point VII

A 50-cent rate for gas would not produce a 7 per cent Return on the Rate Base

In concluding that a 50 cent rate would yield a 7 per cent return based on the 1927 actual operations the court did not make the adjustments necessary in order to test the sufficiency of the 50 cent rate. These adjustments involved first, the quantity of gas sold in a normal year, a temperature correction; second, the quantity and cost of the gas to be purchased including the cost of the Petroleum Exploration gas; third, income tax. Allowing for these necessary adjustments the net income under a 50 cent rate would produce a return of only 2.6%.

III

Errors VIII, XV, XVI; Points V, IX

The Company's Promulgated Rates are just and Reasonable

The Franchise Contract and the Statutes under which this rate proceeding was had, provide that the company shall promulgate the rates it proposes to charge. The only limitation placed upon this right and duty is that the rates be just and reasonable. If the promulgated rates be within that limitation neither the Commission nor Court had any right to change them. The promulgated rates are in proper form, are just and reasonable, and will produce a return of only 5.42% on the rate base fixed by the court.

IV

Error XIII, Point VIII

A 7 per cent return is not fair and reasonable

This case involves rates for natural gas. By the uncontradicted testimony it is shown that the company is entitled to a 10 per cent return. From the nature and character of the commodity supplied an extra hazard is involved in the business of producing and distributing natural gas, and the rate of return should be higher than in the case of ordinary utilities involving no such risk.

V

Error XVII; Point XI

The Court should have granted a permanent injunction against the commission rate

Having found the commission rate confiscatory, the court should have granted a permanent injunction against its enforcement. The refusal of the court to do so unless the company accepted a 50-cent rate and surrendered its statutory right of appeal is not justified by the equitable maxim that "He who seeks equity must do equity." This maxim has no application because the parties themselves by contract have defined their rights pending the final determination of just and reasonable rates. The contract was inherently equitable in its provisions for the protection of both parties and the commission rate being held confiscatory, the company is entitled, as proper equitable relief, to have a permanent injunction granted. Its right of appeal need not be sacrificed. The condition imposed by the court below was unwarranted.

VI

Error XVIII; Point XII

The Costs should not have been assessed against the Company

As the parties had agreed in the franchise contract to pay all court costs arising out of this rate proceeding equally, it was error to order the company to pay the costs.

ARGUMENT

The failure of the Court to give proper effect to the Cost of Gas under the Petroleum Exploration Contract constitutes the main error

Errors III, IV, V, VI, VII, IX, X, XI; Points I, II, III, IV (R. 247-249) (R. 103 to 106); Motion for Findings of Fact, paragraph 3 (R. 92), paragraph 4 (R. 93), paragraph 7 (R. 94), and Conclusions of Law, paragraphs 1 and 2 (R. 95), paragraphs 5 and 6 (R. 95, 96).

(a) The Issue Stated and Facts to be Determined

At the outset it is essential to state the precise issue presented to the court below for its decision and of which it took jurisdiction. The issue is clearly stated in the earlier opinion of the Statutory Court on the question of jurisdiction, 37 F. (2d.) 938. It said:

> "The plaintiff * * *, is engaged in the sale and distribution of natural gas in the City of Lexington, Kentucky, *under a franchise granted to it by the City* on February 25, 1927, * * * (which) *does not fix the rate to be charged for such service.*"

The Court then quotes in full Sections 4 (A), (B), (C), (D), (E) and (F) (R. 32 to 34) of the Franchise Contract prescribing the method for determining the "rate to be charged."

The Court further stated:

> "The bill discloses that, in compliance with Section 4 (B), the plaintiff, within two days after *the effective date of its franchise,* promulgated * * * the

rates proposed to be charged by it *in rendering the service contemplated in the franchise,* and that * * * City of Lexington and S. B. Featherston, * * * filed a complaint with the Railroad Commission, attacking the rates * * * as excessive * * * and asking that the Commission fix just and reasonable rates * * *; a hearing was had and *on October 9, 1929* the *Commission entered an order* holding that the rates proposed * * * were unreasonable * * * and fixing forty-five cents (per M. c. f.) * * * as the lawful rate to be charged * * *. *The order further provides that the rate thus fixed should be effective from January 28, 1927, which date is declared by the order to be the effective date of the franchise.*"

It is thus clear that the lower court understood that the commission had declared a rate for "*the service contemplated in the franchise*" and that such rate should be the lawful rate from "*the effective date of the franchise*" and *for the period from and after that date to the date of the commission order.* The commission named January 28, 1927 as the contract date. This was error—that was the date on which the franchise ordinance was adopted. The "effective date" of the contract was February 25, 1927.

The opinion then quotes paragraphs Fourth and Fifth of the commission order in which it is recited:

> "That the Central Kentucky Natural Gas Company filed herein, at the inception *of this* * * * *controversy,* a copy of *its ordinance-franchise whereunder it is operating* in the City of Lexington; *that said franchise-contract made certain stipulations* * * * *about the fixation of rates under it,* and that the Commission had (has) conformed its procedure as near as might be *to the agreements of said franchise-contract* * * *; that * * * the application of the forty-

five cent rate hereby fixed shall be suspended until there be a final fixation in court of said rates * * *.

That * * * said forty-five cent rate * * * as modified by the court, shall be effective from said 28th day of January, 1927.

Fifth. That * * * there have been impounded under the control * * * of the Commission, *as provided in * * * said franchise,* considerable sums * * * under the temporary rates * * * which * * * are to be distributed * * * under the orders of the courts to which *this controversy* may be taken * * *."

It thus appears that the court below clearly understood that *"this controversy"* over rates arose *under the franchise-contract,* and that the first and essential inquiry was whether the commission rate was valid or confiscatory "from and after * * *" (*the effective date of said franchise*) to the date of said order (Commission Order, clause second, R. 12), and that the second inquiry would be (if the commission rate should be found confiscatory *for such period*), what are the just and reasonable rates guaranteed under Section 4 (A), *"in rendering the service contemplated in the franchise"* (R. 32).

While the Commission had refused to find any facts as to value, net income or return, and merely fixed a 45¢ rate as the lawful rate *"in rendering the service contemplated in the franchise,"* the presumption is that the commission did find some value for the company's property, did estimate some net income, and did have in mind some rate of return. As the rate of 45 cents was made continuous over the period from the effective date of the franchise contract to the date of the rate order it must be further presumed that the commission intended to adopt the same rate base for that period.

As stated above an agreed order was entered (R. 77) submitting the issues presented by the pleadings on the evidence introduced before the Commission (as sufficient for the determination of all questions). On that evidence and under such issues the ultimate questions of fact presented to the court for decision were:

(1) The value of the rate base properties *as of the contract date, and for the period from that date to the date of the commission order*

(2) The fair rate of return for the same period

(3) The allowance for amortization, extraordinary maintenance, and contingencies

(4) The actual net income available for return under the temporary rates, as bearing on the validity of the commission rate and the reasonableness of the company's promulgated rates

(5) The probable net income under the commission rate, and whether that rate was confiscatory

(6) The probable net income under the appellant's promulgated rates, and if those rates appeared excessive, then

(7) Such rates for *"the service contemplated in the franchise"* for the period in question as would yield net income sufficient to earn a fair return on the rate base after making proper allowances for amortization, etc.

(b) How the Court Determined the Rate Base

It now becomes essential to state the substance of the testimony relating to property value and net income available for return. The record shows that the parties had by common consent adopted December 31, 1926 as the con-

venient and logical date for determining the value of the appellant's property used and useful "in rendering the service contemplated in the franchise." The two expert witnesses who testified to values, based on reproduction cost new less deterioration (Kimball for the company, and Carter for the city), made their appraisals on the basis of price levels as of December 31, 1926, which date was only a few weeks prior to the contract date and therefore equivalent to that date (and was so treated by the parties). These witnesses brought up their appraisals to December 31, 1927, by including the cost of net additions made during 1927. The difference (increase) was not material (R. 111, 185, 186).

Mr. Jirgal for the city testified and filed exhibits showing historic cost as of December 31, 1926, and as of December 31, 1927 (R. 185). He also estimated the reproduction cost as of December 31, 1926, and as of December 31, 1927.

There was no other testimony on values, and no evidence of any change in price levels or trends between December 31, 1926, and the date of the commission order, October 9, 1929. It thus appeared that the fair value of the company's property determined as of December 31, 1926, would necessarily be its fair value as of the franchise-contract date, and for the period from and after that date to the date of the commission's order.

As bearing on the question of value, the city also introduced testimony of the exchange by Columbia Gas & Electric Corporation of its preferred stock for the capital stock of the appellant (R. 207 to 212), the market value of the Columbia preferred stock so issued being $2,880,000 (Opinion, R. 83). This exchange or purchase took place as of January 1, 1928.

The court below after considering all the testimony bearing on the value of the property adopted as the best evidence of such value the exchange value or purchase price of appellant's capital stock (Opinion, R. 83). This value, thus established as of January 1, 1928, the court adopted as the value of appellant's property on December 31, 1926. Such value should properly have been applied to the franchise contract date because the question of value arose only under the contract, but the application of such value to December 31, 1926, may be treated as equivalent to the contract date. As already stated, no complaint is here made of the rate base as fixed by the court.

(c) In Determining Net Income the Court Overlooked the Cost of the Petroleum Exploration Gas

The court considered and discussed in detail the evidence presented in company Exhibit No. 4 (R. 112 to 120) reflecting the actual operating results under a 40¢ rate during the years 1922 to 1926, inclusive, and also reflecting the actual operating results in 1926 under the temporary rate then in force (prior to the franchise contract). The court also considered and discussed at some length the actual operating results in 1927 under the temporary rate of 50 cents (60 cents in December) presented in complete detail in company Exhibit No. 8 (R. 152 to 167). The court therefore considered the actual operating results under different rates both before and after the franchise contract, and adopted the experience figures for 1927 (covering a full year after December 31, 1926) as the basis of its conclusion that a 50¢ rate would earn a 7 per cent return on its rate base.

It is thus apparent that the court was in fact attempting to find a rate for gas that would be fair to the company *"in rendering the service contemplated in the franchise,"* and was not endeavoring to determine merely what rate would be fair as of a static date, December 31, 1926, or under the precise operating conditions existing on said date, which was prior to the franchise contract and the period over which just rates were to be determined.

In addition to the actual operating results fully set forth in company Exhibit No. 4 for the years 1922 to 1926, inclusive, and in company Exhibit No. 8 for 1927, Mr. Kimball presented his estimate of net income under the company's promulgated rates in company Exhibit No. 6 (R. 131 to 145).

In this connection we again mention the obligation of the company to furnish gas through an *additional* pipe line to adequate fields of supply (Section 23, R 36) and the subsequent performance of that duty by the company in entering into a contract with Petroleum Exploration for the delivery of gas to the appellant through a second pipe line from Lexington to the gas fields of said company in Owsley County, Kentucky, under which contract the appellant agreed to purchase an annual minimum of 750,000,000 cubic feet of gas at 40 cents per M.c.f. The appellant began furnishing gas through this second pipe line in November, 1927, and by reason thereof the temporary rate went from 50 cents to 60 cents on December 1, 1927, as provided in Section 4(E) of the Franchise Contract (R. 32).

As appears in company Exhibit No. 8, page 14 (R. 165), the Petroleum Exploration delivered to the appellant in 1927, 118,713 M.c.f. of gas, and that the appellant paid for this gas at 40 cents per M.c.f. the sum of $47,485.34. But

the minimum annual cost of gas under this contract would be $300,000.00. Therefore only a small part of such annual cost appeared in the 1927 figures.

The accuracy of the figures set forth in company Exhibit No. 8 showing in detail the actual operating results in 1927 under the temporary rate of 50 cents (60 cents in December) has never been questioned. The court below accepted them and in so doing necessarily recognized and sustained the validity of all of the gas purchase contracts, including the Petroleum Exploration contract, as listed in company Exhibit No. 8, page 14 (R. 165), wherein is set forth the name of each company from which gas was purchased, the quantity purchased, the price and amount paid.

This exhibit shows a net income of $98,307 after deducting the company's allowances for amortization, extraordinary maintenance and contingencies amounting to $121,530 for the Lexington district (company Exhibit 8, p. 5, R. 153-154). The court found these allowances excessive in the amount of $46,267, which it said should be added to the aforesaid net income of $98,307, thus making the court finding of net income available for return in 1927 under the temporary rate of 50 cents (60 cents in December) the sum of $144,574 (R. 89). The court then said:

> "This result may be reasonably accepted, it seems to us, as a fair prophecy of a minimum return during a normal year by the application of a 50 cent rate" (R. 89).

The court's prophecy was thus rested on the actual 1927 operations. But the court overlooked the fact that the actual operations in 1927 did not reflect the entire annual cost of gas under the Petroleum Exploration con-

tract, and therefore that the net income under the operating results in 1927 under the 50 cent temporary rate (60 cents in December) could not be adopted as representing the net income that would be earned in a normal year under a 50 cent rate after making full allowance for the annual cost of gas under the Petroleum Exploration contract.

(d) The Court's Refusal to Make Correction for the Petroleum Exploration Gas and Its Reasons Therefor Examined

Conceiving that the court had merely made an obvious "slip" the appellant filed a petition for correction (modification). This petition was overruled, the court saying in its order (R. 90):

> "*Upon the hearing of this cause the parties requested the Court to fix the base value* of plaintiff's property allocable to Lexington *as of December 31, 1926, and determine whether the rates established by the Commission* afforded a reasonable return on such value *as of said date.* The Court having acted upon such request and made its findings and determinations *as of said date,* the plaintiff now asks the Court to make further findings and determinations based upon its contract with the Petroleum Exploration. Plaintiff did not begin to take gas under this contract until November of 1927, *and it appearing,* therefore, *that there can be no determination of the effect of such contract* upon the reasonableness of the order of the Railroad Commission *without a redetermination of the base value* as of a date subsequent to that adopted and used by the Court at the request of the parties *and a reconsideration of what would be a reasonable rate under changed conditions,* if any: IT IS ORDERED * * *."

Let us analyze the foregoing statements and conclusion. The court says:

(1) The parties requested the court to fix the rate base as of December 31, 1926.

If the court had said that the parties had requested it to ascertain and determine the base value as of December 31, 1926, and to "*fix*" and adopt such value as of the franchise contract date, February 25, 1927, and thereafter for all purposes of this case, its statement would have been accurate. To fix the value as of December 31, 1926 would be a vain thing unless such value was applied to the contract and adopted as the base value for determining the reasonableness of any rate "*in rendering the service contemplated in the franchise*" (Opinion 37 F. (2d) 938, 941).

The court then says:

(2) The parties asked the Court to determine the reasonableness of the Commission rate on the base value as of December 31, 1926.

In view of the fact that the commission applied its rate to the "effective date of the contract," it would have been absurd for the parties to ask the court to determine the reasonableness of the commission rate as of any date prior to the contract, when the commission itself had not so applied it, and when the validity of such rate as of that date was not and could not be an issue in the case. The parties did ask the court to adopt the base value as of December 31, 1926 for the purposes of "this controversy" (being the determination of reasonable rates *under* the franchise contract and not *outside* the contract); and for the purpose of testing the validity of the commission rate

as of the contract date and thereafter to the date of the rate order, because that was the period to which the commission had itself applied the rate, and therefore the validity of such rate was attacked and under inquiry for that period, and not merely as of the contract date. The issues are made by the pleadings, and not by alleged requests. However, the court was never requested at any time by any of the parties to determine the validity of the commission rate as of December 31, 1926, and there is absolutely nothing in the record to support such statement.

The court further says:

> (3) The Court having acted upon such request, the plaintiff now asks the Court to make findings based on its contract with the Petroleum Exploration.

From the very inception of "this controversy" and as a necessary finding of fact to be made the plaintiff had at all times insisted on its right to have a reasonable rate under the franchise contract, and in accordance with the fulfillment by it of the obligation imposed by Section 23 (R. 36), to wit, the making of the Petroleum Exploration contract to secure the additional supply of gas. The cost of gas purchased under this contract in December, 1927, appeared in the company's operating statement introduced in evidence. The contract was filed in the record. The city expressly admitted the right of the appellant to an allowance for the cost of gas under this contract. There was no dispute with the city on this point. It was not open to the court in estimating what the company would earn under a 50 cent rate, or under any other rate, to exclude from operating expenses an item of $300,000.00 per annum which was conceded by the city.

The appellant by its petition for modification did not ask the court to make "further" findings. It asked the court to make the findings it should have made and was asked to make when the case was submitted, findings that were absolutely essential to a proper decision. It was because of the Petroleum Exploration contract and the additional expense thereunder that the parties had stipulated in the franchise contract that the temporary rate of 50 cents should be increased to 60 cents as soon as gas was being furnished through the second pipe line. On its face and by the express terms of the contract the city had agreed that the company would be entitled to a higher rate for its service after the additional cost began under its contemplated contract with Petroleum Exploration and it was furnishing gas through the second pipe line. The appellant insists it would have been preposterous for it to request or consent to any determinations that involved the exclusion of the cost of gas under the Petroleum Exploration contract in determining the validity of the commission rate, and that a determination of the rate base "at the request of the parties" as of December 31, 1926 did not involve the perpetration of any such absurdity.

The court further says:

> (4) The plaintiff did not begin to take gas under this contract (Petroleum Exploration) until November of 1927.

This is true, but appellant's obligation to secure this gas was created by the franchise contract, arose upon the execution of that contract, and was *"the condition"* on which the franchise was granted. The fact that actual delivery of gas under this contract, or that the furnishing

of gas through the second pipe line as required under Section 23 (R. 36) did not commence until December 1, 1927, was no reason why the cost of such gas should not be allowed in determining reasonable rates under the franchise contract *"in rendering the service contemplated in the franchise"* (37 F. (2d.) 938, 941). The phrase quoted is the language of the court. What was the *"service contemplated in the franchise"?* Primarily and essentially the furnishing of gas *through two pipe lines* (Section 23, R. 36), and *"at all times at a uniform and adequate pressure at the outlet of each customer's meter"* (Section 22, R. 35).

The contract with Petroleum Exploration was to enable appellant to render this high standard of service, and the making of such contract was accepted by the city as a fulfillment by the appellant of the obligation imposed by Section 23 as *"the condition of the franchise grant."* In all frankness we submit that the effort of the court below to place on "the parties" the blame for its obvious oversight is wholly unwarranted. The appellant insists that the court was in error in characterizing its request to correct a clear oversight as a request "to make *further* findings" or that such application was inconsistent with the request of "the parties" to determine the base value as of December 31, 1926 and to adopt such value for "this controversy."

The court further says in its order:

> (5) There can be no determination of the effect of the Petroleum Exploration contract upon the reasonableness of the Commission rate without a redetermination of the base value as of a date subsequent to December 31, 1926.

The foregoing statement or conclusion is a *non-sequitur*. The Petroleum Exploration contract affects operating expenses and net income, neither of which have any relation to base value as of any date. The rate base may remain constant while net income may vary with changes in operating conditions, and *vice versa*. Furthermore, the evidence showed without contradiction that there was no substantial change in the value of the property during the period between December 31, 1926 (or the franchise contract date, February 25, 1927) and the date of the rate order. The court had already established the rate base as of January 1, 1928, in taking the market value as of that date of the preferred stock of the Columbia company issued in exchange for the capital stock of the appellant. It merely applied this value to December 31, 1926. The value thus determined as of January 1, 1928, was obviously the same as it was thirty days prior thereto (December 1, 1927, when the temporary rate of 60 cents went into effect), and a "redetermination of the base value as of a date subsequent" was wholly unnecessary because this had in fact been done by the court. And, finally, in ordering a distribution of the impounded funds on the basis of a 50-cent rate being reasonable, the court has by necessary implication adopted and applied such rate base for the period of the impoundment, and has found the commission rate of 45 cents invalid over the same period.

(e) The Court Did Not Understand the Company's Estimate of Net Revenue Under the Promulgated Rates

We have heretofore mentioned the fact that Mr. Kimball had presented an estimate of return under the company's promulgated rates. The supporting figures were

carefully worked out in complete detail in company Exhibit No. 6 (R. 131 to 145). In rejecting this estimate the court said (Opinion, R. 86-87):

> "Plaintiff also makes an estimate of what income would be produced in a normal year by applying the first schedule of 60 cents, which was promulgated in accordance with the ordinance and which was reviewed and held exorbitant by the Railroad Commission. While plaintiff shows a total revenue of $701,276 under such schedule *yet strange as it may seem,* by some process of reasoning it shows a net operating revenue before the deduction of taxes, etc., on the *60* cent rate of *less* than was actually received in 1927 by the application of a *50* cent rate for eleven months and a 60 cent rate for one month. *It is equally strange* that plaintiff shows a net income available for interest and dividends under the first schedule for an assumed normal year of only *$73,013,* as against *$98,307* for the year 1927, where a *50* cent rate was applied for eleven months of the year and a 60 cent rate for only one month. *We cannot accept the soundness of any such figures.*"

The criticism shows conclusively that the court did not understand the Exhibit nor Mr. Kimball's testimony directed thereto. The reason why a less net return was shown by Mr. Kimball under the company rates (averaging 60 cents) than under the temporary rate of 50 cents, notwithstanding the increased gross revenue produced thereby, were in the main two-fold: First, the greatly increased cost of gas caused by the contract made with Petroleum Exploration in compliance with Section 23 of the Franchise (R. 36); second, the decreased consumption caused by the higher rate. (company Exhibit No. 6, p. 11, R. 139).

(f) The Cost of the Petroleum Exploration Gas Must Be Allowed in Operating Expenses

The refusal of the lower court to revise its estimate of the sufficiency of a 50 cent rate for gas so as to give proper and full effect to the cost of the Petroleum Exploration gas constitutes the principal error urged in this appeal.

The question is thus squarely presented as to whether in any estimate of net income as for a normal year for the purpose of testing the validity of the commission rate of 45 cents, or the sufficiency of the court rate of 50 cents, or the reasonableness of the company's promulgated rates, allowance must be made in operating expenses for the minimum cost of the Petroleum Exploration gas delivered through the second pipe line. The record permits but one answer.

The pivotal and essential consideration for the franchise contract, indeed the prime inducement to the city for granting the franchise, was the definite obligation of the company to improve its service by furnishing gas through an additional pipe line built to an adequate source of supply in Kentucky or West Virginia (Section 23, R. 36). The agreement to do this was made the *"condition upon which the franchise is granted."* Failure to fulfill such *"condition"* within the time limited gave the city the right to *"declare this contract at an end"* (R. 36, 37).

The necessity for and importance of this additional pipe line appears in Section 22 of the Franchise Contract (R. 35) which in terms postponed the obligation to furnish gas *"at all times at a uniform and adequate pressure"* until: *"From and after the time when the Company is furnishing gas through * * * two pipe lines."*

That the gas service would be worth more (as well as cost more) after gas was being furnished through two pipe lines was expressly recognized in the contract by providing for an increase in the temporary rate from 50 cents to 60 cents "after it (the company) is furnishing gas through * * * two pipe lines," Section 4(E) (R. 32). There was no difference of opinion between the company and the city on this matter. This conclusively appears from the record. The filing of a copy of the contract with Petroleum Exploration was requested by the city (R. 173). The only estimates of net income offered by the city, based on 1926 sales, made an allowance in operating expenses for 750,000 M.c.f. of gas as the annual minimum agreed to be purchased from Petroleum Exploration at 40 cents per M.c.f. (Carter Exhibit 8, Sheet B, Sheet 2, R. 190, and Carter Exhibit 10, R. 192). The Company's fixed obligation to purchase this gas and to pay annually the sum of $300,000.00 was expressly conceded and stated by counsel for the city and testified to by Mr. Carter (R. 186 to 190). In fact, this was the one gas purchase contract which the city admitted to be a definite and fixed obligation of the company (Carter Exhibit 8, R. 190-191), and is the only contract which the court refused to give effect to.

Appellant contends that under this state of the record it was not open to the court to reject in whole or in part as an operating expense an item of cost thus conclusively established by the proof, and expressly admitted by the city.

(g) The Sufficiency of the 50 Cent Rate Prior to December 1, 1927, and Before the Company Began Furnishing Gas Through Two Pipe Lines Is a Moot Question

It is of course obvious that until the cost of gas under the Petroleum Exploration contract actually became an operating expense, to-wit, December 1, 1927, when the second temporary rate of 60 cents went into effect, no allowance could be made therefor in determining net income from the contract date, February 25, 1927, until December 1, 1927, a period of nine months. The validity of the commission rate of 45 cents and the sufficiency of the court rate of 50 cents for that period must be determined on the basis of the gas purchase contracts existing as of the Franchise date, and without regard to the cost of gas under the Petroleum Exploration contract. It was actually on this basis that the court below found the commission rate invalid and confiscatory. It was on the same basis that the court based its "prophecy" that a 50 cent rate would earn a 7 per cent return on the rate base. Later in this brief we demonstrate that a 50 cent rate (excluding the Petroleum Exploration gas) would not in fact produce a 7 per cent return on the court's base value, and that such rate after making the proper adjustments would in fact produce a return of only 6.3 per cent on such value.

But whether a 50 cent rate would be adequate for the period from the contract date to December 1, 1927, when the second temporary rate of 60 cents went into effect on account of the Petroleum Exploration gas, is really a moot question because for that period the temporary rate collected was only 50 cents. Therefore, even if the company were entitled to a higher rate for that period it would now be impossible for it to collect more than the temporary

rate. Furthermore, it might perhaps be fairly contended that the company in agreeing to the temporary rate of 50 cents for that period impliedly consented to be satisfied with that rate even if the commission or court should find that it was entitled to a higher rate. The appellant is not disposed to insist on a contrary view.

It is therefore only necessary for this Court to determine whether the appellant is entitled to a higher rate than 50 cents after the cost of the Petroleum Exploration gas began, and the 60 cent temporary rate went into effect. Later in this brief we demonstrate that under the company's promulgated rates (averaging 60 cents) it would earn less than a 6 per cent return on the court's rate base.

(h) While the Court Should Have Specifically Applied Its Findings of Fact to the Contract Date and to the Period of the Rate Order This Was in Fact Done by Necessary Implication

Subsequent to the lower court's action in refusing to give effect to the full annual expense of gas under the Petroleum Exploration contract the appellant filed a motion for special findings of fact and statement of conclusions of law thereon, thus presenting the theory of the appellant both as to the facts and the law. This motion was overruled without comment other than to state that the court considered its findings of fact and statement of its conclusions of law thereon sufficiently set forth in its opinion.

We have already discussed the Points made and the Errors assigned relating to the Petroleum Exploration contract. It remains to consider the court's refusal in express terms to apply the facts found to the contract date, and specifically to determine the validity of the commission's

rate over the period to which the commission itself had applied that rate.

The court in its opinion and decree relates all of its findings of fact to December 31, 1926. However, the court in finding that a 50 cent rate would be reasonable actually applies that rate to the period over which the money has been impounded out of the temporary rates and thus by necessary implication actually applies the rate base to the same period. It holds the commission rate to be invalid and confiscatory over the same period.

Merely because the parties requested the court to determine the value of the property as of December 31, 1926, to which the evidence on reproduction cost new less deterioration was directed, creates no magic about that date. The question of value and all other questions arise under the contract and cannot be determined by conditions existing prior to its effective date. The value date was selected by the parties solely as a matter of convenience, and because of its immediate proximity to the franchise contract date. There was no difference in value or net income as between these two dates.

The court's error in making its findings as of December 31, 1926 instead of for the period of the rate order may be treated as technical, rather than substantial. It would appear that while the court has refused to do this in terms it has done so by necessary implication in directing a distribution of the fund impounded under the contract on the basis of a 50 cent rate as reasonable, an order inconsistent with any view other than that the court intended to apply its base value to that period and to hold the commission rate confiscatory over such period. If that shall be the view of this Court then the errors assigned

based on the lower court's refusal specifically to apply its findings to the period of the impoundment may be disregarded.

That would leave under this branch of the argument only the court's error in refusing to make the proper allowance for the cost of gas under the Petroleum Exploration contract. As will be discussed later in this brief the appellant contends that on the undisputed facts of this record this Court should find its promulgated rates are in fact just and reasonable, that lower rates would be confiscatory, and direct the entry of a decree sustaining said rates.

A 50-cent rate for Gas would not produce a 7 per cent Return on the Rate Base

(Error XII, Point VII)

As the basis for the conclusion that "a 50 cent rate may be reasonably expected to earn" a 7 per cent return, the court used the operating results in 1927 under the temporary rate of 50 cents (60 cents for the month of December) set out in Company Exhibit No. 8. The court failed, however, to make certain necessary adjustments of the 1927 figures before it could properly determine whether a 50 cent rate would in fact produce in a *normal* year a net income sufficient to make a 7 per cent return on the rate base. This can be readily demonstrated. For that purpose we submit the computations shown in the tabular statements following. Including the cost of the Petroleum Exploration gas the 50 cent rate would yield a return of only 2.6 per cent. It is necessary to make only three adjustments,

(1) to show the consumption of gas in a normal year, a temperature correction, 1927 being warmer than usual, and in a normal year the consumption and sales would be greater than they were in 1927, and gross revenue would be correspondingly greater; (2) as more gas would be sold the expense for purchased gas would be increased, and (3) the amount of Federal Income tax would likewise be affected by the difference in net income.

For purposes of comparison Statement No. 1, column 4, also shows estimate of return under the company's promulgated rates which is discussed later in this brief.

STATEMENT NO. 1

	1927 Actual Per Kimball Exhibit No. 8	1927 Actual As Allowed by Federal Court	Estimate—Normal Year—1927 Corrected for Deviation from Mean Monthly Temperature including cost of Petroleum Exploration Gas	Return under Promulgated Rates
Retail Rate for Gas in Lexington	50c 1st 11 Mo. 60c—Dec.	50c 1st 11 Mo. 60c—Dec.	50c	
Income Account Based on Treating Central Ky. Co. and Lexington Utilities Co. as a Unit and Disregarding Rental Payments of Former to Latter:				
Revenue—				
Gas Sales	$ 606,912 (1)	$ 606,912 (1)	$ 622,784 (8)	$ 691,670 (12)
Gasoline, Shop, Interest, Miscellaneous	5,942 (2)	5,942 (2)	5,942 (2) (9)	9,606 (13)
Total	$ 612,854 (1)	$ 612,854 (1)	$ 628,726	$ 701,276 (13)
Operating Expenses—				
Field and Main Line Expense	$ 33,024 (1)	$ 33,024 (1)	$ 33,024 (1) (9)	$ 28,464 (13)
City Plant Expense exclusive of Rental	47,681 (1)	47,681 (1)	47,681 (1) (9)	41,946 (13)
General Expense	16,596 (1)	16,596 (1)	16,596 (1) (9)	21,839 (13)
Gas Purchased	269,703 (1)	269,703 (1)	360,499 (10)	379,848 (13)
Total	$ 367,004 (1)	$ 367,004 (1)	$ 457,800	$ 472,097
Net Operating Revenue, etc. (before Taxes)	$ 245,850 (1)	$ 245,850 (1)	$ 170,926	$ 229,179
Taxes—				
Franchise Tax	$ 14,620 (3)	$ 14,620 (3)	$ 14,620 (3) (9)	14,620 (13)
Tangible Property Tax	6,694 (3)	6,694 (3)	6,694 (3) (9)	6,694 (13)
Federal Capital Stock Tax	.....	.....	.....	.....
Miscellaneous Assessments	.....	.....	.....	.....
Federal Income Tax	4,699 (3)	4,699 (3)	17,039 (11)	13,322 (13)
Total	$ 26,013 (3)	$ 26,013 (3)	$ 38,353	$ 34,636 (13)
Net Operating Revenue, etc. (after Taxes)	$ 219,837 (1)	$ 219,837 (1)	$ 132,573	$ 194,543
Amortization, etc.—				
Amortization and Depletion:				
Central Ky. Nat. Gas Co.	$ 82,477 (4)	$ 50,000 (7)	$ 50,000 (7)	50,000 (7)
Lexington Utilities Co.	12,191 (4)	10,263 (7)	10,263 (7)	10,263 (7)
Extraordinary Maintenance:				
Central Ky. Nat. Gas Co.	12,878 (4)	10,000 (7)	10,000 (7)	10,000 (7)
Lexington Utilities Co.	8,384 (4)	5,000 (7)	5,000 (7)	5,000 (7)
Contingencies—Central Ky. Nat. Gas Co.	5,600 (4)	..... (7)	..... (7)	..... (7)
Total	$ 121,530 (4)	$ 75,263	$ 75,263	$ 75,263
Net Income Available for Interest and Dividends	$ 98,307 (5)	$ 144,574 (7)	$ 57,310	$ 119,280
Investment (Rate Base)	$2,639,296 (6)	$2,198,107 (7)	$2,198,107 (7)	$2,198,107 (7)
Return on Investment—Per Cent	3.7%	6.6%	2.6%	5.42%

NOTES:
(1) Company Exhibit No. 8, pg. 6, Col. 4 (R. 155)
(2) " " No. 8, " 6, " 4 (R. 155) Sum of Gasoline, Shop, Interest and Misc. Revenue
(3) " " No. 8, " 15, " 4 (R. 167)
(4) " " No. 8, " 16, " 2 (R. 167)
(5) " " No. 8, " 5, " 2 (R. 154)
(6) Opinion R. 83, 84
(7) Opinion R. 82
(8) 1,245,568 M. c. f. (estimated retail sales Lexington District at 50 cent rate—Company Exhibit No. 6, pg. 11, col. 9) x $0.50 (R. 139)
(9) As allowed by implication in decision of Court (see Note 7 above)
(10) See detail sheet (Statement No. 3 attached)
(11) " " " " No. 4 ")
(12) Company Exhibit No. 6, pg. 5, Col. 6 (R. 135)
(13) " " No. 6, " 4, " 2 (R. 134)

STATEMENT NO. 2

Estimated Gas Sales (M. c. f.) and Revenue for the Entire System and Portion Allocated to Lexington District, Based on a Retail Rate of 50 cents per M. c. f., Giving Effect to Mean Temperature from 1906 to 1926 inclusive

	Entire System				*Lexington District*		
	Total Sales (M. c. f.)	*Average Rate per M. c. f.*	*Revenue*	*Basis of Allocation*	*Total Sales (M. c. f.)*	*Average Rate per M. c. f.*	*Revenue*
RETAIL SALES							
Lexington District	1,245,568 (1)	$ .50	$ 622,784	Location	1,245,568	$ .50	$ 622,784
Winchester	268,596 (2)	.50	134,298	"	.....	....	.....
Mt. Sterling	156,432 (2)	.50	78,216	"	.....	....	.....
Total Retail Sales	1,670,596		$ 835,298		1,245,568		$ 622,784
WHOLESALE SALES							
Frankfort, Ky. Nat. Gas Co.	323,932 (2)	$ .35 (3)	$ 113,376		.....	....	.....
Kentucky Utilities Co.	180,097 (2)	.375 (4)	67,536		.....	....	.....
Blue Grass Nat. Gas Co.	15,407 (2)	.375 (5)	5,778		.....	....	.....
Total Wholesale Sales	519,436 (2)		$ 186,690		.....	....	.....
Total Sales	2,190,032		$1,021,988		1,245,568		$ 622,784

NOTES: (1) Company Exhibit No. 6, p. 11, Col. 9 (R. 139)
(2) " Exhibit No. 6, p. 12, Col. 3 (R. 140)
(3) " Exhibit No. 6, p. 12, Note A (R. 140)
(4) " Exhibit No. 6, p. 12, Note B (R. 140)
(5) " Exhibit No. 6, p. 12, Note C (R. 140)

STATEMENT NO. 3

Estimated Quantity and Cost of Gas Purchased Assuming a Retail Rate of 50c per M. c. f., and Giving Effect to Mean Temperature from 1906 to 1926, Inclusive

(A): Giving Effect to Petroleum Exploration Co. Contract (taking minimum allowance only)

Name of Company	*Minimum Quantity per Contract (M. c f.)*	*Estimated Quantity of Gas Purchased (M. c. f.)*	*Contract Price per M. c. f.*	*Estimated Cost of Gas Purchased*	*Basis of Contract Price per M. c. f.*
United Fuel Gas Co.	720,000 (1)	720,000 (2)	$ 0.25	$ 180,000	50 Per Cent of Average Domestic Rate (6)
Petroleum Exploration Co., Inc.	750,000 (1)	750,000 (2)	.40	300,000	40 Cents per M. c. f. at Lexington City Gate (6)
Hillsdale Gas Co.	720,000 (1)	450,000 (2)	.23⅓	105,000	20 Cents plus ⅓ of any increase over 40 cents per M. c. f. (6)
Bed Rock Petroleum Co.	1,220,000 (1)	125,000 (2)	.15	18,750	30 Per Cent of Average Domestic Rate (6)
Carroll Oil and Gas Co.	300,000 (1)	200,000 (2)	.10	20,000	10 Cents per M. c. f. (6)
Kentucky Cities Gas Co.	1,000,000 (1)	125,000 (2)	.20	25,000	17.5 Cents plus 25 Per Cent of Increase over 40 Cents per M. c. f (6)
Various Independent Producers	..... (1)	350,000 (2)	.10	35,000	10 Cents per M. c. f. (6)
Total Purchased Gas		2,720,000 (2)	$ 0.2514	$ 683,750	
Red Bush Production		100,000 (2)	.....	.....	
Total Gas Purchased and Produced		2,820,000 (2)		$ 683,750	
Estimated Total Gas Sales		2,190,032 (3)			
Estimated Loss and Company Usage		219,003			
Total		2,409,035			
Balance: Gas Stored in Ground		410,965	$ .1213 (5)	$ 49,850	
Gas Purchased Account		2,409,035	$ .2631	$ 633,900	
Estimated Retail Gas Sales in Lexington District:					
M. c. f.		1,245,568 (4)			
As Per Cent of Total Gas Sales		56.87%			
Cost of Gas Allocated to Lexington District				$ 360,499	

NOTES: (1) Company Exhibit No. 6, p. 15, Col. 1 (R. 143)
(2) " " No. 6, p. 15, Col. 2 (R. 143)
(3) See detail sheet (Statement No. 2 attached)
(4) Company Exhibit No. 6, p. 11, Col. 9 (R. 139)
(5) Company Exhibit No. 6, p. 15, Col. 3 (R. 143)
(6) Company Exhibit No. 6, p. 15—"Basis of Contract price per M. c. f." (R. 143)

STATEMENT NO. 4

Estimate of Federal Income Tax

	With Proper Allowance for the Cost of Petroleum Exploration Gas.
Gross Revenue	$ 628,726 (1)
Less:	
Expenses—	
Field and Main Line	$ 33,024 (1)
City Plant	47,681 (1)
General	16,596 (1)
Gas Purchased	360,499 (1)
Total Expenses	$ 457,800 (1)
Extraordinary Maintenance	
Central Ky. Nat. Gas Co.	10,000 (1)
Lexington Utilities Co.	5,000 (1)
Other Taxes Paid	
Franchise Tax	14,620 (1)
Tangible Property Tax	6,694 (1)
Miscellaneous Deductions	8,400 (2)
Total Expenses and Deductions	$ 502,514
Net Revenue Subject to Federal Income Tax	$ 126,212
Federal Income Tax (13½%) (3)	$ 17,039

NOTE: (1) See Statement No. 1, preceding Column 3

(2) Company Exhibit No. 6, p. 17, Col. 3 (R. 144)

(3) As used in Company Exhibit No. 6, p. 17 (R. 144)

STATEMENT No. 1—Item "Gas Sales" (explained in Statement No. 2).

In concluding that a 50 cent rate would be reasonable the court used the company's actual figures for 1927. Gas sales amounted to $606,912 in 1927. (Company Exhibit No. 8, p. 6, R. 155). The quantity of gas sold in 1927 was 1,175,954 M. c. f. (Company Exhibit No. 8, p. 8, R. 157). But 1927 was an unusually warm year. In a normal year the quantity of gas sold at 50 cents would be 1,245,568 M. c. f. (Company Exhibit No. 6, p. 11, R. 139). The revenue would be $622,784 as shown in Statements Nos. 1 and 2.

STATEMENT No. 1—Item "Gas Purchased" (explained in Statement No. 3).

The next figures in Statement No. 1, to which attention is directed, are those opposite "Gas Purchased," in the third column, $360,499. This figure is based on the inclusion of Petroleum Exploration gas, and is explained in detail in Statement No. 3. The difference between this figure and the figures appearing in Statement No. 1, columns 1 and 2, $269,703 as "gas purchased" which was the actual figure for 1927, and used in the court's estimate of net income, are due to the same causes, to-wit: the requirement of 1,245,568 M. c. f. as of a normal year consumption instead of 1,175,954 actual for 1927, and to show the quantity and cost of gas purchased from the various producers.

STATEMENT No. 1—Item "Federal Income Taxes" (explained in Statement No. 4).

The court in using 1927 figures adopted the item of Federal Income tax, amounting to $4,699.00 based upon a net income of $98,307 (Company Exhibit No. 8, page 15, column 4, R. 167). Statement No. 4 correctly computes the income tax under a 50 cent rate, on the basis of including the cost of the Petroleum Exploration gas. This tax would be $17,039 as contrasted with the above figure of $4,699 used by the court.

The Rates Promulgated by the Company

(Errors VIII, XV, XVI, Points V, IX)

(a) Under the Express Terms of the Franchise Contract the Appellant Has the Right to Fix Its Own Rates and Charges Provided Only They Are Reasonable—a Flat Rate Is Discriminatory and Unjust to Both Company and Consumers

The Franchise Contract, the result of long negotiation and careful preparation, provides in Section 4(A) (R. 32):

> "Sec. 4(A) The Company shall have the *right* to charge, demand, collect and receive for its gas service just and reasonable rates, charges or compensation."

Appellant contends it has the right under both the State law and the contract to determine its own schedule of rates, and the form thereof. Such schedule may contain a minimum and service charge, a higher commodity rate for

smaller quantities of gas and lower rates for larger quantities. In other words, the company may put into effect a promotional type of rate. The only limitation upon this right is that the rates must be reasonable. If the net income derived under such rates is insufficient to produce a fair rate of return on the fair value of the company's property neither the commission or court may lawfully interfere with such rates or compel the company to accept a flat rate, since under such form of rate gas sales would be less. Mr. Kimball testified that the company's net income would be less under a flat rate of 60 cents than it would be under the appellant's promulgated rates which average 60 cents (R. 133).

The court may take judicial knowledge of the fact that Lexington is near large bituminous coal fields and that the fuel (natural gas) which the company has to sell comes into keen competition with coal. Unless the company is permitted to have a minimum and service charge, and to charge higher rates for the first few thousand feet of gas used for cooking and water heating (and worth for such purposes considerably more than for space heating by reason of its great convenience and instant service), the ability of the company to compete with coal for heating is seriously impaired. Gas for heating is considerable of a luxury, and unless the price can be made low enough to induce the average consumer to use gas instead of coal the company's main source of revenue will be curtailed.

The principles on which block rates for utility service are based, and the discriminatory character of a flat rate, are well known and need neither explanation nor supporting argument. (*U. S. Light & Heat Co.* v. *Niagara Falls Gas & Electric Light Co.*, 23 F. (2d) 719.) It is obvious

that a flat rate operates as a discrimination against the substantial user by making him carry the small or convenience user who in the absence of a minimum or service charge would be carried at an operating loss. Such loss would necessarily have to be made up from the substantial user if the company is to have an adequate revenue.

In the recent case of *Citizens' Committee* v. *Kings Lighting Co.*, P. U. R. 1933 B, 151, the New York Public Service Commission held a flat rate for gas economically unsound and discriminatory. In the opinion written by Chairman Maltbie it was said:

> "After many months of extended hearings and lengthy and detailed consideration, the Commission decided upon a form of rate for the two companies just named which provided for initial blocks of consumption, a minimum bill of $1 and follow-on rates for all consumption in excess of the initial blocks. The Commission held that the amount in the initial block and the follow-on rate should in all fairness be varied according to the peculiar facts applicable to each company. In the case of the Brooklyn Union Gas Company, the initial block was made 600 cubic feet and the follow-on rate was 95 cents; in the case of the Brooklyn Borough Gas Company, the initial block was 500 cubic feet and the follow-on rate $1.05. In many other cases which have been considered affecting other areas throughout the state, the Commission had made its determinations consistent with the decisions in the two Brooklyn cases, holding that the Commission is in duty bound to treat all utilities alike and to apply the same principles to other cases which were decided upon after so many hearings and such long consideration given to the matter in the Brooklyn cases.
>
> . . . . . .

> The Kings County Lighting Company has asked in its petition that the Commission continue the form of rate now in effect, which is a flat price per thousand cubic feet, with no minimum bill or initial block. *The Commission determined in the two Brooklyn cases referred to that this form of rate was unfair, would interfere with the proper development of the gas business, and did not equitably distribute among the various classes of users the cost of the service.* To continue the flat rate would be to reverse the previous determinations of the Commission, and our experience with the new forms of rates justifies no such reversal of policy." (Id. 152-153)

Independently of the company's contract right to fix its own rates and charges the Kentucky statute expressly recognizes such right (Section 201e-2, Appendix, p. 91). The statute permits a change by the commission only in case of extortion (Section 201e-14, Appendix, p. 92). This statute also makes it the duty of the Railroad Commission to correct discriminations and prevent undue advantages (Section 201e-5, 11, Appendix, pp. 91, 92).

Appellant insists that under and by virtue of the "right" created by the contract, as well as a right recognized by statute, it may promulgate its own form of rates; that it should not be required to charge a flat rate, and that its own promulgated rates cannot be lawfully disturbed unless shown to be "excessive."

(b) The Company's Promulgated Rates Are Just and Reasonable

Pursuant to the requirement of the franchise contract, Sec. 4(B) (R. 32), the company promulgated the following schedule of rates:

60 cents net (63 cents gross) minimum charge including the first 100 cu. ft. per month;
6 cents net per 100 cu. ft. for the next 900 cu. ft. per month;
60 cents net (63 cents gross) per 1000 cu. ft. for the next 4000 cu. ft. per month;
50 cents net (53 cents gross) per 1000 cu. ft. for all gas in excess of 5000 cu. ft. per month.
(averaging 60 cents—Opinion R. 86—Kimball, R. 149)

The appellant in paragraph 8 of its Motion for special Findings of Fact (R. 94) requested a finding that the promulgated rates were just and reasonable from and after the date of the franchise contract (February 25, 1927), and that any lower rates would be confiscatory (Error VIII, Point V).

In view of the fact that from the contract date to December 1, 1927, the temporary rate was only 50 cents, the right of the company to a higher rate for that period is of no practical moment, and the reasonableness of the company's rates averaging 60 cents need be considered only from and after December 1, 1927, when the company began furnishing gas through the second pipe line and the cost of the Petroleum Exploration gas first became an annual operating expense in the amount of $300,000, and by reason of which the temporary rate went to 60 cents under the franchise contract.

Appellant maintains that since this cause comes up on both the law and the facts, *i. e.*, on its merits, this Court may and should find that the company rates are just and reasonable, and direct the lower court to enter a decree to that effect. *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 559, 568.

This branch of the argument is therefore directed to the testimony of Mr. Kimball (R. 145 to 154), explaining the grounds and reasons for his estimate of net revenue fully set forth in Company Exhibit No. 6, *supra*. The Court is asked to note that this estimate, carefully and logically worked out, is the only one introduced or offered by either side. Mr. Kimball's method and basic facts on which his estimate was made were never contradicted or challenged. While the various computations in this Exhibit may be somewhat difficult to follow, the principles on which they are based are readily comprehended, and we shall briefly explain the essential features of this Exhibit.

The quantity of gas sold depends on weather conditions. It was necessary therefore to ascertain the differences in consumption caused by temperature conditions in the "winter" months.

It was also necessary to determine the effect on consumption caused by the increase in the rate from 40 cents to 50 cents. This computation is found on page 10 (R. 138-b) and shows that on account of the increase in rate from 40 cents (1920-1925) to 50 cents (1926 and 1927) there had been a decrease in consumption.

On page 11 (R. 139) is shown (column 1) the actual consumption in 1927 as 1,175,954 M. c. f., but corrected to mean temperature conditions the consumption under the temporary rate of 50 cents would have been 1,245,568 M. c. f. (column 9). On the same page is shown the estimate that on a further increase from the temporary rate of 50 cents to the company's promulgated rates (averaging 60 cents, which is equivalent to the temporary rate fixed by the parties), there would be a further decrease in sales in a normal year; and that the total sales in the Lexington

district under the 60-cent rate would be 1,152,150 M. c. f. (column 9).

Having thus arrived at the estimated annual consumption in a normal year for the Lexington district, Mr. Kimball then calculated the gross revenue that would be derived therefrom under the company's promulgated rates. The result shows that in a normal year the company would derive a gross revenue under its 60-cent (average) rate of $691,670 (p. 6, column 14, R. 136-a). To this is added the revenue from Gasoline, Shop, Interest and Miscellaneous $9,606, being the average revenue from these sources for the years 1924-1926, inclusive (Exhibit 6, p. 13, R. 141), thus making the total gross revenue for the Lexington district $701,276 (R. 134).

The expenses (other than for purchased gas) represent the average for the years 1924-1926, inclusive (R. 142). These figures were also adopted by the city (Carter's Exhibit 8, Sheet 1, R. 191).

The only disputed item of expense appearing in Mr. Kimball's exhibit was that of "Gas Purchased," being $673,250 (R. 143) for the entire system, and $379,848 for the Lexington district (R. 134). The details supporting this estimate of the cost of gas appear on page 15 of Exhibit 6 (R. 143). The sources of purchased gas are there shown. The estimated quantities of gas that would be delivered by the various companies furnishing gas, the prices thereof, and the total cost is developed. The principal sources of supply as shown on this page are United Fuel Gas Co. (its contract calling for a minimum of 720,000 M. c. f. per annum) and the Petroleum Exploration (being the annual minimum of 750,000 M. c. f.), the Hillsdale Gas Co., with a contract minimum of 720,000 M. c. f. (R. 143),

but which the evidence shows had been unable to deliver that amount (R. 118-a, 165), and, therefore, the delivery by that company, as well as the deliveries by all other producers, was estimated on the basis of prior annual deliveries (Exhibit 4, R. 118-a).

The city offered no estimate of its own, although it had the services of an exceptionally able accountant, Mr. John Jirgal of Chicago, who testified to the historic cost of the company's property, and who also estimated the cost of reproduction as of December 31, 1926, and as of December 31, 1927.

Appellant therefore contends that the Kimball estimates based on the company's gas purchase contracts and the actual experience of the company should have been accepted by the court as correct in the absence of any suggestion or testimony by any witness showing any error in method or in the company records.

The remaining item of expense was "Taxes" amounting to $34,636 for the Lexington district (R. 134, 144).

The total amount claimed by the company for amortization, etc., was $121,530 (R. 145). The court allowed $75,263, being $46,267 less than claimed by the company (Opinion, R. 88). The following statement shows the net income under the promulgated rates, adjusted to the allowances made by the court:

REVENUE:	
Gas Sales	$691,670
Gasoline, Shop, Interest and Miscellaneous	9,606
TOTAL	$701,276
OPERATING EXPENSE:	
Field and Main Line Expense	28,464
City Plant Expense (Exclusive of rental)	41,946
General Expense	21,839
Gas Purchased	379,848
TOTAL	$472,097
Net Operating revenue before deduction for Taxes, Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	229,179
Taxes:	
Franchise Tax	14,620
Tangible Property Tax	6,694
Federal Income Tax	13,322
	$34,636
Net Operating Revenue before deduction for Amortization, Depletion, Extraordinary Maintenance, Contingencies, Interest and Dividends	194,543
AMORTIZATION, ETC. (ESTIMATED)	
Amortization and Depletion:	
Central Ky. Nat. Gas Co.	82,477
Lexington Utilities Co.	12,191
Extraordinary Maintenance:	
Central Ky. Nat. Gas Co.	12,878
Lexington Utilities Co.	8,384
Contingencies:	
Central Ky. Nat. Gas Co.	5,600
TOTAL	$121,530
Net Income Available for Interest and Dividends	73,013
Add: Amount by which the Kimball allowances for Amortization, etc. were reduced	46,267
Available for Interest and Dividends	119,280
Rate Base (by Court)	2,198,107
Return	5.42+%

(See, also Statement No. 1, column 4, *supra.*)

Fair Return

(Error XIII, Point VIII)

One of the issues involved in this case is what rate of return the company (appellant) is entitled to earn upon its investment or property used in rendering natural gas service to the residents of Lexington, Kentucky.

The Court below held that a 7 per cent rate of return was adequate. There was no evidence to support such finding. It can be justified only upon the theory that a court may (contrary to the undisputed evidence on the subject) take judicial notice of the proper rate of return for any given utility. We have found no case holding that a court may under the doctrine of judicial notice determine and fix the rate of return (a question of fact) to which a utility is entitled. The rule appears to be otherwise. In all the reported cases involving the question of rate of return evidence on the subject appears to have been introduced and the decision predicated on such record evidence.

This court has laid down the applicable rules and standards for determining a fair rate of return in a number of cases. In *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 692-693, it was said:

> "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on invest-

ments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

In the recent case of *United Railways* v. *West*, 280 U. S. 234, 251-252, this Court observed that a rule cannot be laid down "which will apply uniformly to all sorts of utilities. What may be a fair return for one may be inadequate for another, depending on circumstances, locality and risk." The Court also said:

> "It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, a return of 6.26 per cent. is clearly inadequate. In the light of recent decisions of this Court and other Federal decisions, it is not certain that

> rates securing a return of 7½ per cent. or even 8 per cent. on the value of the property would not be necessary to avoid confiscation."

The natural gas industry operates under more hazardous conditions for investors than other public utilities. As was said by the Supreme Court of New York in *Pennsylvania Gas Co.* v. *Public Service Commission,* 207 N. Y. Supp. 599, 611:

> "The hazards of the natural gas business are also relevant facts in determining what will constitute a fair return."

Rate of return has to do with attracting capital to an industry or business, and judged by the attitude of investors (past and present) toward natural gas companies the rate of return of such utilities must be considerably higher than that of others to make their securities attractive. The necessity for allowing a higher return to natural gas companies because of the extra hazard and uncertainty of the business (it being a mining venture of limited life—dependent upon a wasting asset) is quite generally recognized by Public Service Commissions and Courts.

In *Re Ashtabula Gas Company,* P. U. R. 1917 D, 790, 795-796, the Ohio Commission, in allowing a ten (10%) per cent return to the company, said:

> "The natural gas business differs materially from that of any other which is classed as a public utility. Its production is in the nature of a mining venture. It can be produced only in limited areas, and when once discovered, it is only by continuous mining that the extent of the field can be ascertained and the supply maintained.

Electricity may be produced anywhere that the machinery can be installed. Water may be found either on or below the surface, everywhere save in the desert. Telephonic communication and railway transportation may be indefinitely carried on anywhere, and all of these services may be perpetually furnished, but natural gas is limited to comparatively few localities, and the life of the enterprise depends upon the uncertain supply of nature. Experience has taught that at best a field cannot last longer than two or three decades. Those who engage in the venture must get their money back within a few years or not at all, and those who enjoy the luxury must pay a sufficient sum to enable the producer to do so, or capital will not be attracted to such ventures.

Because of the hazard and uncertainty of the business, c mmissions and courts have recognized the justness of granting to a gas company a higher rate of return on its investment than is given to other utilities which furnish a commodity whose cost of production can be ascertained with reasonable certainty and whose business can be perpetuated."

In *Re Baker Natural Gas Utility*, P. U. R. 1921 E, 609, 627-628, the Montana Commission said:

"Eight per cent seems now to be the minimum for all ordinary public utility investments in our jurisdiction (In Re Missoula Street Railway Company, 14 M. U. R. ....., Decided December 7, 1920), and eleven or twelve per cent can not be too much for a capital outlay of many thousands of dollars in materials and appliances which may be reduced in value to zero 'in the twinkling of an eye.' If natural gas, 'the element and best natural fuel known to man' is to be put to its highest use, household con-

> sumption, efforts in this behalf must be liberally rewarded (U. S. Dept. Interior, Bureau of Mines, Tech. Papers, 40-69, p. 19), and this has been done quite uniformly and without support from 'war causes.' "

In the case of *Wichita Gas Company* v. *Public Service Commission of Kansas,* decided January 5, 1933, ... F. (2d) ....., P. U. R. 1933 B, 225, it was held that any return less than 8 per cent would be confiscatory. The court said:

> "We are of the opinion that a return of approximately eight per cent upon present values is necessary under present conditions to assure confidence in the financial soundness of the Cities Service Gas Company, to maintain its credit, and to enable it to raise money necessary for the discharge of its public duties, and that any return substantially lower than eight per cent would be confiscatory" (P. U. R. 1933 B, 233).

In response to the contention that the return should be less because the times were abnormal, it was said:

> "The witness for the Commission testified that 8 per cent would not be an unreasonable return in normal times, but testified that these times are abnormal, as they are. But if abnormality is considered, the return must be increased, not decreased. In these times, when stock of the best utilities can be purchased on a 9 per cent basis or better, certainly an 8 per cent return on this hazardous enterprise is not unreasonable." (P. U. R. 1933 B, 254.)

The only testimony offered on this question was on behalf of the appellant. Mr. Kimball testified that in his opinion this company should have a return of 10 per cent. (R. 151). No witness was called by the city to give any

opinion concerning the proper rate of return. It is fair to assume that the city made due inquiry as to what rate of return would be necessary in order to induce capital to invest in the capital stock and business of appellant and ascertained from well-informed persons it would require at least a 10 per cent return to attract investment funds to a natural gas enterprise in this locality, as otherwise testimony to the contrary would have been introduced.

The appellant contends it was not open to the Court to disregard the evidence and fix a 7 per cent rate of return. But assuming for the sake of the argument that the Court could rightfully ignore the evidence and determine the rate of return solely on the basis of judicial knowledge, it seems clear that a 7 per cent return would be confiscatory for a natural gas company, exposed as it is to hazards that do not attend the business of other public utilities.

In the case of *Western Oklahoma Gas & Fuel Co.* v. *State,* 113 Okla. 126, 129, the Supreme Court of Oklahoma approved a return of 16 per cent for a natural gas company. And in *United Fuel Gas Co.* v. *Railroad Commission,* 13 F. (2d) 510, affirmed in *United Gas Co.* v. *Railroad Commismission,* 278 U. S. 300, the Court approved an allowance of over 16 per cent for return, depreciation and amortization. In the latter case, 13 F. (2d) 510, 524, the District Court (Eastern District of Kentucky) said:

> "It is urged by the company that the rate should be made up of at least 10 per cent representing interest upon investment and profits, and 6 per cent to cover depreciation and depletion. While we are of the opinion that 5 per cent in this particular case will amply cover depreciation and depletion, and that 10 per cent profit is perhaps high, the contention of the complainants may here be conceded, with-

> out varying the result at which we have arrived. * * * A 9 per cent return upon the appreciated valuation claimed, of $66,000,000, which we assume to be ample, would closely approximate 16 per cent return upon the rate base here found."

In a number of comparatively recent decisions it has been held that a rate of return of not less than 8 per cent was necessary in order to avoid confiscation for water, electric light, telephone and artificial gas utilities. We cite the following typical cases:

Southwestern Bell Telephone Co. v. *City of Ft. Smith,* 294 Fed. 102, affirmed in 270 U. S. 627;
Brush Elec. Co. v. *Galveston,* 262 U. S. 443;
Louisiana Water Co. v. *Public Service Commission,* 294 Fed. 954;
Consolidated Gas Co. of New York v. *Prendergast,* 6 F. (2d) 243, affirmed in *Ottinger* v. *Consolidated Gas Co.,* 272 U. S. 576;
Springfield Gas and Electric Co. v. *Public Service Commission of Missouri,* 10 F. (2d) 252;
Brooklyn Borough Gas Co. v. *Prendergast,* 16 F. (2d) 615, 622.

Even in the case of the railroads where Congress has passed limiting legislation, this Court has indicated that a return of around eight per cent is necessary is avoid confiscation. See *Dayton-Goose Creek Ry. Co.* v. *U. S.,* 263 U. S. 456, 486.

In *Denver Union Stock Yard Co.* v. *United States,* 57 F. (2d) 735, 745, the court held that 7½% return was the minimum allowance for a company engaged in a non-hazardous business. The court said:

"The Secretary found that 7½ per cent was a fair return. The petitioner introduced evidence that the capital structure of such a property as the petitioner's would involve bonds, preferred stock, and common stock; and by a compilation of the interest and dividend rates that would be necessary on all securities, arrived at the conclusion that anything less than 10 per cent. on the full valuation would be an unreasonably low rate. This means that the common stock, carrying the risk of the entire investment, would receive much in excess of 10 per cent. But we do not think that the return upon property used and useful should be increased or decreased because of the capital structure of a particular owner. We think the Secretary's method of allowing a percentage upon the value of the property used and useful in the public business, without respect to the capital structure, is permissible. Otherwise the rates of two identical properties would vary accordingly as one owner had issued bonds or preferred stock and the other owner had not. It seems to us that a 7½ per cent. return is a minimum. *It must be remembered that no return at all is assured; the effect of the order is to grant permission to earn that sum, if the owner is able so to do.* We have some doubt whether, as conditions are presently, capital could be attracted from investments which assure 5 or 6 per cent. backed by a large margin of safety, to an enterprise which offers only a permission to earn a maximum of 7½ per cent. The history of the petitioner discloses considerable fluctuations in earning power from year to year. While we have doubt whether a permissive rate of 7½ per cent. is sufficient to attract capital, it is, after all, a matter of opinion, and we resolve the doubt in favor of the Secretary's finding. The Secretary knows what a vital service these stockyards render

> to his particular charges, the farmers and the cattlemen; he knows the hardship that it would entail if they were deprived of the services of such institutions."

As said by this Court in *Public Service Commission of Montana* v. *Great Northern Utilities Company*, ... U. S. ....., decided April 10, 1933:

> "The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation. Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 410. Smyth *v.* Ames, 169 U. S. 466, 546. Wilcox *v.* Consolidated Gas Co., 212 U. S. 19, 41. Missouri Pacific Ry. Co. *v.* Tucker, 230 U. S. 340, 347. The Minnesota Rate Cases, 230 U. S. 352, 434. Board of Comrs. *v.* N. Y. Tel. Co., 271 U. S. 23, 31. But it does not assure to public utilities the right under all circumstances to have a return upon the value of the property so used."

Until recent years there was but a negligible quantity of natural gas securities on the investment market. It is practically impossible to find any published literature, except of very recent date, on the subject of utility financing which make reference to natural gas companies. In an article on the "Measurement of Risk in Public Utility Industries" published in the February and August, 1930 issues of the Journal of Land and Public Utility Economics, Mr. John F. Reinboth demonstrates that the difference in the yields of the bonds of various classes of utilities is the true measure of the investor's estimate of the risks inherent therein. He shows the direct relationship between the in-

vestor's opinion of the risk inherent in the particular kind of utility service and the yield on its bonds. Mr. Reinboth compares the yields on the six dominant classes of public utility bonds to the yields on municipal bonds during the period from 1909 to 1929, but nowhere in the whole study is there any reference to natural gas issues. This is an indication of the limited demand for natural gas securities in the investment world.

There is little in common between the financial structure of a utility and an industrial concern. The utility is designed and financed to serve not the average continuous demand, but the maximum demand of its consumers at all times. It must serve not only those whom it may economically reach, but all persons in the community. A large industrial consumer may close its doors during times of depression, but the utility must be in position to render adequate service at all times to its remaining patrons.

The utility's investment has but little relation to its annual earnings. In the usual manufacturing enterprise the entire capital may be "turned over" several times a year, and the value of its yearly product may approximate the capital investment; while in the case of a utility the capital turn-over is slow and the value of the annual product is never more than a fraction of its invested capital. Also, the industrial company is free to change at will the type of its activities while the utility is restricted by its franchise to rendering a particular service under rigid conditions. This, of course, means a much higher capital investment and a more substantial financial venture for the public utility investor.

It is necessary to fix a rate of return sufficiently high to attract capital to the business in order that a utility may

properly discharge its duties to the public. Only in this way can its credit be supported and its financial soundness preserved. Money invested in a hazardous business commands a rate of return commensurate with the degree of risk in the enterprise. As stated in *Louisiana Water Co.* v. *Public Service Commission,* 294 Fed. 954, 957 "no rate of return can be deemed reasonable which is not high enough to attract capital to the form of investment involved in utility properties." In *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 49, the Court said:

> "One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security."

And in *McCardle* v. *Indianapolis Co.,* 272 U. S. 400, at page 419:

> "It is obvious that rates of yield on investments in bonds plus brokerage is substantially less than the rate of return required to constitute just compensation for the use of properties in the public service. Bonds rarely constitute the source of all the money required to finance public utilities. And investors insist on higher yields on stock than current rates of interest on bonds. Obviously, the cost of money to finance the whole enterprise is not measured by interest rates plus brokerage on bonds floated for only a part of the investment. The evidence is more than sufficient to sustain the rate of 7 per cent found by the commission. And recent decisions support a higher rate of return."

If it be urged that a 7 per cent return is sufficient because of the extraordinary business depression which exists at the present time, the appellant answers that there was no economic depression in this country in February, 1927, at which time the reasonableness of the rates promulgated and collected by it is to be considered and determined. In this connection, we also invite attention to the recent decision of the Alabama Commission in *Smith* v. *Birmingham Gas Co.*, P. U. R. 1932 B, 241. In its opinion in that case (at pp. 245-247) the Commission said:

> "The question raised in this proceeding, i. e., 'Why utility rates should not decline in company with falling commodity prices,' is one that has been asked by many consumers of utility service in recent months. It is a very natural inquiry under present conditions, and it is pertinent to the issues in this case, to point out some of the fundamental differences between public utility business and private enterprises.
>
> The Alabama public utility act was enacted in October, 1920. Under the law, it is the duty of the commission to supervise rates of the utilities, as well as their securities and standards of service. The commission requires periodic reports of their revenues, operating expenses, and capital expenditures, and through its staff, the commission makes inspections of the operations and operating records of such utilities.
>
> Under the commission's regulation, utilities are prevented from charging more for their services than will provide a reasonable return upon the fair value of their property devoted to the public use.
>
> On the other hand, unregulated industrial and commercial enterprises are free to charge for their products all that can be obtained during prosperous

times. The limit to their price of profit is determined by supply and demand.

In the case of regulated utilities, the regulation of rates and control of return is exercised to the end that rates, at all times, be maintained at a reasonable level. Were the utilities unregulated, as is true of private enterprises, if they were free during prosperous times to fix rates without regulatory control, then they could with justice, perhaps, be subjected to the price fluctuations suffered by private business during economic depressions. If, however, they have not been permitted to earn more than a fair return during prosperous times, this fact must be given due consideration when we deal with their rates and their rate of return during periods of general business depression.

It must be apparent, therefore, to every thinking man, that public utilities cannot be subjected to the sharp price fluctuations which are incident to private business.

In connection with this subject, it must be remembered that the ordinary commercial enterprise turns its capital over several times each year. The utilities turn their capital over once in four to ten years. Thus fixed charges, taxes, depreciation, and interest, being determined by the amount of the capital or investment required to conduct the business, are very high for utilities, as compared with the usual commercial and industrial establishments. These fixed charges make up from fifty to seventy per cent of the cost of furnishing utility service. They cannot be reduced during period of smaller output and sales of utility service. In fact, taxes continue to increase every year.

The remaining costs of utility service, comprising thirty to fifty per cent of the total, do not for reasons we have pointed out and for other reasons ap-

parent, afford the opportunity for the same proportion of reduction of total operating cost resulting from decrease in commodity prices as applies in cases of most private enterprises.

There is another important difference between utilities and private business. In hard times like the present, the private business ceases to borrow money, immediately curtails expenses by cutting down production or by refusing to buy, unless the price is satisfactory, and, if necessary, closes up shop and awaits more prosperous times. The public utility because of its obligation to continue to serve and to render adequate service, is greatly limited as to the extent to which it can go in making any such economies."

It will be noted that the Railroad Commission made no finding in respect to what constitutes a fair return for appellant. The finding of the court below on this question, not being based upon or supported by the evidence, should be set aside.

A Permanent Injunction Should Have Been Granted

In its opinion handed down July 11, 1932, 60 F. (2d) 137, 141 (R. 89), the court said:

> "We are not determining future values, nor do we undertake to fix a rate of return applicable to a changed valuation or to any future situation involving changes in the consumption of gas, cost of operation and the like. We think, however, that *the 45 cent rate* promulgated by the Commission, as applicable to the date herein involved, December 31, 1926, *is inadequate and must be regarded as confiscatory.*"

In its decree entered September 22, 1932 (R. 99), the court said:

> "Fifth: That the forty-five cent rate for gas fixed by the Railroad Commission by its order entered on October 9, 1929, will not yield a seven per cent rate of return and is found to be inadequate and invalid; and plaintiff is entitled to an injunction restraining its enforcement, but only if the plaintiff will do equity by consenting to or requesting the return to its customers in Lexington all of sums impounded under the order of this court and other tribunals in excess of a reasonable charge as more fully indicated herein below.
>
> * * * * * * * *
>
> Seventh: That by an opinion filed herein on July 11, 1932, which opinion is made a part of this decree, it was provided, among other things, as follows:
>
> 'An order of injunction, enjoining the enforcement of the Commission's order, will accordingly be issued, provided the plaintiff file in this court in ten days a written request that this court order all funds in excess of the 50 cent rate impounded under its orders distributed to and among the consumers of the plaintiff in Lexington entitled thereto, and provided further that it file in this court within ten days satisfactory evidence that it has made written request of the Railroad Commission of Kentucky and of the Fayette Circuit Court of Kentucky that those tribunals make like orders of distribution of all funds in excess of the fifty cent rate which are impounded and held under their orders.'
>
> That before the ten days elapsed, the complainant filed its petition for a modification and/or amendment of the opinion; that on July 29, 1932, an order was entered by the court overruling said petition, and that said order gave the complainant a further

extension of ten days from said date wherein to exercise its option as aforesaid, and that on August 6, 1932, the complainant filed with the court a written statement declining to accept the condition set forth in the option."

Although expressly finding that the commission rate was "inadequate and * * * confiscatory," and "inadequate and invalid" the court refused to grant a permanent injunction against its enforcement.

Appellant contends that the court misapplied the equitable maxim that, "He who seeks equity must do equity." The contract entered into between the parties, as also the issue presented by the pleadings and facts in this case, left no room for the application of the equitable maxim. The maxim presupposes that the defendant has an equity which cannot be protected unless the relief sought by plaintiff is granted on such terms as will protect the defendant's equity. In the absence of an equity in the defendant the maxim can have no proper application. The city, and the consumers represented by the city, possessed no equity which needed protection. The parties had in the franchise contract created and provided their own code of equity pending the final determination of just and reasonable rates. It was agreed in Section 4(E) (R. 32) that the temporary rate of 60 cents and the impoundment thereunder should continue as long as this controversy should be pending in any court.

The requirement imposed by the court as a condition to granting the injunction protected no equity in the city, and was extremely inequitable to the company. It was equivalent to a demand that the company not only acquiesce in the opinion expressed by the court that a 50 cent rate

for gas would be reasonable, and consent to a distribution of the impounded fund on that basis; but also compelled the plaintiff to forego and surrender its legal right to appeal from the decree. If the appellant had thus voluntarily consented to accept a 50 cent rate and had requested a distribution of the impounded funds on that basis, it could not complain of a decree entered thereon and therefore could not appeal therefrom or otherwise obtain a review of the decision.

The defendants (appellees) were not asserting any right to be protected against the continued collection of the temporary 60 cent rate pending an appeal. On the contrary, the defendant Attorney General for the State of Kentucky (an appellee herein), specifically stated in Paragraph VIII of the Answer (R. 52) that:

> "Upon the contrary the defendant Cammack avers and states that he will abide * * * by the contract provision of the franchise set up with the bill, by which plaintiff Company has the right to collect, pending litigation, 60 cents per thousand for its gas sold in Lexington, and that he, the defendant Cammack, specifically disclaims any purpose to take any legal steps whatsoever as against plaintiff Company with respect to said 45 cent rate as long as said contract provision is in force."

Furthermore, the Answer, in Paragraph X, alleged on behalf of each and all of the defendants as follows:

> "Defendants, and each and all of them, further aver and state, and now by their pleading here bind themselves to, and agree that they will in all respects be held and bound by the said 60 cent *pendente lite* agreed rate, and that they expect to, and will, take

no steps of any nature or kind to evade or avoid the said agreement, or to put into application the 45 cent rate named in the said order of the Railroad Commission of October 9th, 1929, as long as the said matter is under litigation, as is provided in said franchise contract; * * *''

The parties having agreed that the temporary rate of 60 cents, and the impoundment thereunder, should continue until the final determination of just and reasonable rates and charges ''by the highest court to which the same may be taken,'' a court of equity could not, in the proper exercise of its discretionary power, impose as a condition to the granting of equitable relief that the plaintiff seeking relief from an admittedly illegal rate order should surrender its rights under the law of the land and a contract deliberately entered into by the city. By the terms of Section 4(E) (R. 32) Franchise Contract until the final determination of the rate controversy the company was to be protected by the collection of the temporary rate of 60 cents. On the other hand the city and the consumers were to be protected by the impoundment of 10 cents collected under said rate. This was the mutual equity and protection thereof agreed to by the parties.

''A maxim of equity will not be applied for the purpose of defeating equity.'' 21 C. J. 172, (Sec. 150).

''The maxim should be applied only to cases where the result that would be worked out without its aid would be against equity and good conscience. The party seeking relief is not required to sacrifice his own rights.'' 21 C. J., 175 (Sec. 152).

''Thus it cannot be successfully invoked to overthrow a plain contract voluntarily entered into with

knowledge of all the facts." 21 C. J., page 178 (Sec. 156).

A case in point on this question is *Pottenger* v. *Bond* (Ind.), 142 N. E. 616, wherein the court, at page 621, says:

> "While we recognize that courts of equity, in granting relief, are not circumscribed by any fast or technical rules, and hence have a broad discretion in framing their decrees, in order to adopt the relief to the circumstances of each particular case, there are limits beyond which even a court of equity may not go. One of such limitations is stated in a recent legal treatise as follows:
>
> 'It is not the province of a court, however, to change the terms of a contract which has been entered into, even though it may be a harsh and unreasonable one. Nor will the dictates of equity be followed if by so doing the terms of the contract are ignored, for the folly or wisdom of a contract is not for the court to pass upon. Its terms, however onerous they may be, must be enforced if such is the clear meaning of the language used, and the intention of the parties using that language.' 13 C. J. 541.
>
> See also, Pittsburgh, etc. Co. *v.* Lake, etc., Co., 118 Mich. 109, 76 N. W. 395; Cody, etc. Co. *v.* Coach, 76 Or. 406, 146 Pac. 973; Pine, etc. Co. *v.* Crystal, etc., Co., 65 Fla. 254, 61 South. 576. Should it be urged that this general rule is not without its exceptions, our answer would be that no facts are found which would warrant the application of an exception. The contract is not unconscionable or its methods of performance impracticable. Its terms are not even harsh, and certainly no facts are found which tend to excuse a substantial compliance."

What is said of the contract involved in the last cited case can certainly be said of the contract in this case. It would be difficult to devise provisions more inherently equitable than those in the Franchise Contract, preserving as they do the rights of both parties in the impounded funds pending the final fixation of rates, providing for the ultimate distribution thereof, and also preserving to both sides the lawful right of appeal.

The "equity" which must be done by the party seeking equity is well defined in the case of *Otis* vs. *Gregory,* 111 Ind. 504, 13 N. E. 39, where the Court said:

> "Accepting the maxim above referred to as in the highest degree authoritative, it becomes proper to inquire concerning the manner of its application in the practical adjustment of controversies between parties. What is the 'equity' which a party appealing to a court of chancery must do before he is entitled to relief? Can a party who becomes plaintiff in a court of equity be compelled, as the price of the relief demanded, to surrender to the defendant something which the latter could not have compelled by some proceeding, either at law or in equity, in case the former had not appealed to the court? If he can, then the rule that he who would have equity must do equity depends for its application in each case upon the arbitrary notions of the chancellor concerning the equities between parties. The effect of such an application of the rule would inevitably, in many cases, be to refuse aid to which a plaintiff would be entitled, except upon condition that the latter should concede to the defendant some supposed equitable right which was not enforceable at law or cognizable in a court of equity, and, hence, not within any description of a legal or equitable right."

Many additional cases illustrating and supporting the principle announced in the foregoing authorities could be readily assembled, but we are convinced there is no necessity for this.

A court of equity may undoubtedly grant a temporary injunction on terms against an apparently confiscatory rate pending final disposition of the case on the merits. The following cases offer appropriate illustrations:

City of Toledo v. *Toledo R. R. & Light Co.*, 259 Fed. 459;

Consolidated Gas Co. v. *Newton*, 267 Fed. 231, affirmed in 258 U. S. 165;

Public Service Railroad Co. v. *Board*, 276 Fed. 979.

But in each of those cases there was a corresponding equity which demanded protection. The parties had not stipulated or agreed upon an arrangement as between themselves which would afford such protection as they have in the instant case.

There was no necessity for the court to impose upon this appellant such a harsh and inequitable condition as a prerequisite to granting a permanent injunction against the commission rate. In order to determine the rights of the parties it was merely necessary for the court below to decide that the Railroad Commission rate was confiscatory and enjoin its enforcement; and order a distribution of the impounded funds on the basis of the rate found by it to be reasonable. Such a decree would have been a determination of the rights of the parties in the impounded fund and would have left them equally unhampered in the exercise of their lawful right of appeal. Pending such appeal the

collection of the temporary rate and the impoundment thereunder would have fully protected their respective rights. It is submitted that the court improperly applied the equitable maxim and that the condition imposed as a prerequisite to the granting of a permanent injunction against the commission rate was arbitrary and not a valid exercise of the court's discretionary power.

Appellant Should Not Have Been Ordered to Pay the Costs

In sub-paragraph (a) of paragraph Eighth of the decree, the Court orders:

> "(a) That the prayer for a permanent injunction herein be and the same is denied with costs to be paid by the complainant to the several defendants to be taxed" (R. 100).

So much of this decree as directs the appellant to pay the costs is contrary to and violative of the contract between the parties. The franchise provides (R. 38):

> "Sec. 35. The cost of conducting all hearings instituted by the City or by the Company before the Railroad Commission, court or other tribunal, to which both the City and Company are parties shall be paid equally by the City and the Company; but each shall pay all fees and expenses of all witnesses, experts and lawyers engaged or called by it."

It seems clear that the agreement of the parties should govern this matter.

The Appellee, City of Lexington, Has Caused to Be Certified and Printed a Large Portion of the Record Which Is Not Essential to This Appeal, on the Theory That It May Without Taking a Cross-Appeal Urge Errors Alleged to Have Been Committed Against It by the Trial Court

The appellant is moved to enter a protest or complaint against the bringing up from the lower court and the required printing by the Clerk in this Court at the instance of appellees of many pages of the transcript which are not essential to this appeal, thereby enlarging the record unnecessarily and adding to the labors of this Court.

The portion of the printed record referred to appears at pages 193 to 246, no part of which is essential to the consideration of any of the Errors assigned or any of the Points upon which appellant relies in this appeal.

An examination of the portion of the record in question will disclose that the evidence embraced therein applies to the following matters and contentions made by the City of Lexington in the court below:

(a) That appellant was not entitled to any allowance whatever for amortization.

By making an allowance for amortization the court decided against the city's contention.

(b) That from and after the intercorporate relation arose between the Columbia Gas & Electric Corporation, the United Fuel Gas Company and the appellant by reason of the acquisition by the Columbia company of the capital stock of the appellant, the Columbia being then the owner of all of the capital stock of the United Fuel Gas Company,

the appellant should not be permitted to charge into operating expenses the contract price paid by it to the United Fuel Gas Company for gas purchased under a twenty-year contract made with that company in November 1912; and that because there was proof that the prevailing price in Kentucky and West Virginia for gas at the well was from ten to twelve cents, the appellant should not be allowed to charge into operating expenses more than 12½ cents per M. c. f. for the gas purchased by it from the United Fuel Gas Company at Inez, Kentucky.

The court below disallowed the city's contention on the ground that the contract between appellant and the United Fuel Gas Company was made at arm's length and at a time when there was no intercorporate relation.

(c) The city further contended in the lower court that the appellant had the legal right to terminate all of its gas purchase contracts with other producers (except Petroleum Exploration) wherein the prices were in excess of 12½ cents; and inasmuch as the United Fuel should be required to furnish all of the gas which appellant might need at 12½ cents, the latter should not be permitted to charge into operating expense the contract price paid by it for gas under these gas purchase contracts with other producers, or any price in excess of 12½ cents.

The court below accepted as correct the actual operations for 1927, which are fully set forth in Company Exhibit No. 8 already discussed, thereby sustaining the right of appellant to charge into operating expenses the prices paid by it under these several gas purchase contracts. By necessary implication therefore the city's contention was overruled.

No error was assigned by the appellant as to any of the above matters. Appellant has accepted the court's rate base, its allowance for amortization, and its ruling on all of the gas purchase contracts other than the contract with Petroleum Exploration. Hence in this appeal none of the testimony relating to said matters was or is essential. The City of Lexington did not appeal from the decree of the lower court and, of course, has not assigned any errors to the rulings of the lower court.

However, the appellant has been put on notice that the city claims the right to ask this Court to consider the rulings of the court below on the above matters. This contention is predicated upon the power of this Court to consider rulings of the lower court presented by the record and urged by the appellee as error without a cross-appeal provided appellee's contention would operate to sustain the decree.

In support of its right to include the portions of the record objected to by appellant as not essential and to urge upon this Court as errors the rulings of the lower court on the above points, the city relies upon *United Railways* v. *West,* 280 U. S. 234, and *Langnes* v. *Green,* 282 U. S. 531.

We apprehend the substance of the contention for the city will be that conceding the lower court was in error in not making a proper allowance for the cost of the Petroleum Exploration gas (amounting to $300,000 per annum, as admitted by the city) yet such error is counter-balanced by other errors made in the company's favor. Appellant contends that it is not open to the appellee to urge such alleged errors in this appeal because the city has no itself appealed. We are not unmindful that this may be a matter for the exercise of judicial discretion (see *United States* v.

Henry Prentiss & Company, ... U. S. ....., decided January 9, 1933), but conceding the power of the court in the premises the question remains whether the record presented on which the court is requested to consider the alleged errors is such as will enable it properly to exercise such power. Before referring to recent decisions of this Court which appear to sustain our position, we invite attention to the record which has been brought here.

Inasmuch as the appellant assigned no error to the rulings of the lower court on amortization and gas purchase contracts, it did not include any of the evidence on those points (other than such as bears on the Petroleum Exploration contract) because none of that evidence was germane or essential to the appeal.

However, the appellee has caused to be certified and printed *some* of the evidence bearing on said matters. The court thus has in the record brought here only the evidence which the city desired for its present purpose, and which is limited to the evidence introduced by the city on the subject matter. It does not contain any of the evidence introduced by the appellant on these subjects. This is apparent on the face of the printed record.

The order entered in the court below filing the Railroad Commission record on which this cause was submitted sets out in detail the contents of that record and all of the Exhibits (R. 77 to 82). This order shows that there was filed Company Exhibit No. 4 on Net Revenue available for return, etc. This exhibit was prepared and testified to by Mr. Kimball. In the printed Record (R. 113) appears the complete index to this Exhibit which sets out the following subject headings.

Summary of Estimated Annual Allowance Necessary for Amortization, Depletion, Extraordinary Maintenance and Contingencies 28
Details of Estimated Annual Allowance Necessary for Amortization and Depletion, and the Proportion Allocated to the Lexington District 33
Details of Estimated Annual Allowance Necessary for Extraordinary Maintenance and Proportion Allocated to Lexington District 39

As no part of the exhibit covering the above topics was essential to the appeal those parts were omitted therefrom in obedience to Equity Rule 75, as well as all of the testimony of Mr. Kimball directed to said matters. Nor did appellant include any of the city's evidence on this subject, which consisted of the lengthy essay of Mr. Beckner on the subject of the geology of Eastern Kentucky and the writer's optimistic "prophecy" as to the total amount of gas that might some day be discovered in all Eastern and Southeastern Kentucky. As rebuttal to this purported evidence for the city on the subject of gas reserves, the appellant introduced Mr. James A. Yunker, a *practical* and experienced gas engineer, who filed an exhibit showing his estimates of gas reserves ("Exhibit Yunker's No. 1—Gas Reserves in Eastern Kentucky"). Since this exhibit and Mr. Yunker's testimony was not essential to this appeal, they were omitted by the appellant in its Statement of Evidence.

It thus appears that the record now here contains the city's evidence on the subject of gas reserves (relied on by it as affecting appellant's right to amortization), but none of the evidence introduced by the appellant. Under this state of the record it seems clear that this Court is not in position to determine the validity of the city's contention

that the court below erred in making any allowance whatever for amortization.

It will be necessary to consider only four of the decisions of this Court which appellant relies on as stating both the rule and the limitations thereon.

In *United States* v. *American Railway Express Co.*, 265 U. S. 425, the Court said:

> "The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this court because they were overruled by the district court and the American did not take a cross appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view *either to enlarging his own rights thereunder or of lessening the rights of his adversary,* whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree *any matter appearing in the record* although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

It seems apparent that the city can not now be permitted to urge that the court below was in error in making any

allowance for amortization because that involves an attack on the decree for the purpose of lessening the rights of the appellant, as well as with the view of enlarging the city's rights. Furthermore, we invite attention to the words "any matter appearing in the record." Does this mean *fully* appearing, with all of the evidence on the subject, or only *partially* appearing with the evidence of only one side?

In *United Railways* v. *West*, 280 U. S. 234, 253, it was said:

> "The commission sought a review of the question in respect of the annual depreciation allowance, both by a cross-appeal and, later, by petition for certiorari. The question of jurisdiction on the cross-appeal as well as the consideration of the petition for certiorari was postponed to the hearing on the merits. We do not now find it necessary to decide either matter. As the amount of depreciation to be allowed was contested throughout, is a necessary element to be determined in fixing the rate of fare and is closely related in substance to the case *brought here by the company's appeal*, it well may be considered in connection therewith. In these circumstances neither cross-appeal nor certiorari is necessary to present the question."

It appears that the record brought to this Court in the *West* case contained at least all that was necessary to enable it to pass on the question raised.

In *Langnes* v. *Green*, 282 U. S. 532, 535, 538, the Court said:

> "The preliminary objection is urged by petitioner, that, since the decision below upon this point was against respondent and he has not applied for certiorari, the point is not open here for considera-

tion; but the objection is without merit, as a brief review of the decisions of this court will disclose.

* * * * * *

These decisions simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so. In the present case, however, it is not necessary to consider this rule of practice because the respondent offers no objection to the decree of the court of appeals. In that court he attacked the decree of the district court upon the two grounds above stated, and the circuit court of appeals sustained the attack but upon one of such grounds only. Respondent here defends that decree upon the ground upon which it was based, and, in addition, continues to urge the rejected ground, not to overthrow the decree, but to sustain it. His right to do so is beyond successful challenge, quite apart from the fact that this is a proceeding in admiralty, and is here from an intermediate appellate court. * * * And, obviously, the right or duty of this court to consider these additional grounds will neither be affected by their rejection in the court below, nor be made to depend upon the effect finally given to them here."

In *Halbert* v. *United States,* 283 U. S. 753, 764, this Court said:

"So far as can be determined from the record the district court rightly applied the rules stated in this opinion. *The record does not purport to contain, and evidently does not contain, all the evidence that was produced on the hearing.*

* * * * * *

> It is thus rather plain that the statement of evidence contains only so much of the evidence as was deemed essential to the decision of the latter. We now are asked to consider questions not raised by the assignment of errors and *which cannot be properly decided without appropriate assurance that the record contains all the evidence that is material to their decision.* We must decline to consider them."

The city urges that the court below was in error in allowing in operating expenses the contract price paid by appellant to United Fuel Gas Company after the intercorporate relation arose (January 1, 1928). The city contends that the acquisition of appellant's capital stock by the Columbia company created a legal unity or identity as between the appellant, the Columbia, and the United Fuel; and that such alleged identity had the legal effect not only of extinguishing the contract between the appellant and the United Fuel Gas Company, but also gave the city the right to require the latter company (with which the city had no contract) to furnish all the gas appellant might need at 12½ cents per M. c. f. by reason of the claim that gas was selling at the well in Eastern Kentucky and in West Virginia at from 10 to 12 cents.

The city's theory seems fantastic. A contract made in 1912, valid and enforceable on February 25, 1927 when the company and the city made their franchise contract, is not converted into a device or scheme to render a rate confiscatory that would be otherwise lawful by reason of the purchase of the appellant's capital stock by the Columbia company in 1928. Such purchase could not possibly affect the validity of existing contracts between the appellant and other companies.

The remaining alleged error which the city proposes to urge, although it did not appeal, is that the appellant could lawfully abrogate or cancel all of its gas purchase contracts and refuse to receive any more gas under them; and on the basis of this assumed premise the appellant should not be allowed to charge into operating expenses more than 12½ cents for the gas purchased under these contracts by reason of the further assumption that the city has the right to compel the United Fuel Gas Company to furnish to the appellant all the gas it may need over and above what it is required to purchase from Petroleum Exploration. This proposition is even more untenable than the first one.

Whether the appellant, if it attempted to terminate its gas purchase contracts would be subjected to suits for damages or for specific performance and might as a result be compelled to take and pay for such gas, does not seem to be considered as of any importance by the city in the application of its theory. Furthermore, the prevailing price of gas at the well in Eastern Kentucky and West Virginia can have no bearing on this matter. It was not shown nor is it claimed that there is any gas available to the appellant except that which it now purchases from the various producers with which it has contracts.

Neither commission nor court will attempt to control the judgment of the company's officers in the management of its affairs. In *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 289, it was said:

> "It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to

ownership. The applicable general rule is well expressed in State Public Utilities Commission *ex rel.* Springfield *v.* Springfield Gas & E. Co., 291 Ill. 209, 234, P. U. R. 1920 C. 640, 125 N. E. 891:

> 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.' "

Nor will a commission or court condemn a contract between inter-related companies in the absence of bad faith. In *United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 320, the court said:

> "We recognize that a public service commission, under the guise of establishing a fair rate, may not usurp the functions of the company's directors and in every case substitute its judgment for theirs as to the propriety of contracts entered into by the utility; and common ownership is not of itself sufficient ground for disregarding such intercorporate agreements when it appears that, although an affiliated corporation may be receiving the larger share of the profits, the regulated company is still receiving substantial benefits from the contract and probably could not have secured better terms elsewhere."

The inter-relation between the appellant, the Columbia company and the United Fuel did not affect the separate corporate identity of the appellant or establish a corporate unity between these companies. *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 132,

But even if these contentions had merit it would not now be open to the city to urge them as it has not appealed from the decree of the lower court.

Conclusion

The appellant submits the following:

1. The court below having found the Commission rate confiscatory should have granted a permanent injunction against the enforcement of its order.

2. The cost of the Petroleum Exploration gas should be allowed in operating expenses from and after December 1, 1927, as of which date such added expense began and the agreed temporary rate of 60 cents went into effect.

3. The return fixed by the court is inadequate for a natural gas utility. The only testimony in the record is that the company was entitled to a 10 per cent return. It was not open to the court to disregard the evidence.

4. The court below having found that a 50 cent rate was reasonable under operating conditions existing over the period of the 50 cent temporary rate the funds impounded thereunder should be turned over to the company.

5. Under the State law and the express terms of the Franchise Contract the company has the right to fix its own rates so long as they are not excessive, and the record conclusively shows that allowing for the cost of gas purchased from Petroleum Exploration the rates promulgated by the company will yield a return

of only 5.42% on the rate base fixed by the court. This rate averages 60 cents, and is equivalent to the 60 cent temporary rate agreed upon by the parties. The company's rates being reasonable, the funds impounded under the temporary rates should be released to it.

It is respectfully urged that the rates promulgated by the company pursuant to the provisions of the Franchise Contract should be adjudged the lawful rates during the period here in question; that the decree appealed from be reversed, and the court below directed to enter a decree permanently enjoining the enforcement of the commission's order and delivering to appellant the impounded funds collected under the temporary rates.

Respectfully submitted,

HENRY T. DUNCAN,
DYKE L. HAZELRIGG,
CHESTER J. GERKIN.

Lexington, Kentucky,
April 20, 1933.

APPENDIX

Kentucky Constitution

Section 163:

"No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply."

Section 164:

"No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to reject any or all bids. This section shall not apply to a trunk railway."

Kentucky Statutes

(Revised Edition 1930)

Section 201e-2:

"Every company distributing, furnishing or selling natural gas in this state shall print and publish, in legible form, a schedule showing the rates charged for natural gas furnished or sold by it in the different cities of this state and a copy of such schedule shall be filed with the railroad commission and with the city clerk or recorder of each city so furnished, and such schedule shall at all times be opened to public inspection."

Section 201e-5:

"Whenever a duty or obligation is imposed upon any company mentioned in this act by law which relates to the rates, tolls, fares, classification, charges, service, rules, regulations or practice of any such company, or whenever a complaint is filed alleging a violation of this or any other law relative to such company, the same shall be under the supervision and regulation of the railroad commission which shall have authority, after due notice and hearing as provided by law, to issue an order fixing just and reasonable rules or regulations or practice to be thereafter followed and to prescribe the rate of toll to be charged or service to be performed thereafter to relieve any undue or unreasonable discrimination, prejudice or advantage found to exist in violation of law; and such rates, classifications, charges, fares, tolls, rules, regulations or practice so ordered shall be substituted for the rates, classifications, charges, fares, rules, regulations or practice then in force by any such company, and power

is by this act conferred upon said commission to make and put into effect joint rates."

Section 201e-11:

"It shall be unlawful for any such company to make or give any undue or unreasonable preference or advantage to any particular person or locality or any particular discription of traffic in any respect whatever; or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, or to make or give any undue or unreasonable preference or advantage to any particular person or locality in the transmission of messages, or to subject any particular person, firm, company, corporation or locality to any undue or unreasonable prejudice or disadvantage in the distribution, furnishing or sale of natural gas, or to subject any such person or locality to any undue or unreasonable prejudice or disadvantage."

Section 201e-14:

"When a complaint shall be made to the Railroad Commission accusing any express company, telephone company, or telegraph company, or natural gas company, mentioned in the act of charging or collecting or receiving extortionate rates for transportation of property or for the transmission of messages, or for telephone boxes, over its line or lines in this commonwealth or for the distribution, furnishing or sale of natural gas in this commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates of toll or tolls are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible, provided, that as to any telephone

company said complaint shall be signed by at least five of its *bona fide* patrons. Said commission shall give the company complained of not less than ten days' notice, by letter mailed to an officer or agent of said company, stating the time and place of the hearing of same, also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company is or has been guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which such company may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office signed by the commission, and a copy thereof mailed to an officer or agent of the company affected thereby, and be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record."

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY, APPELLANT,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL., APPELLEES.

OBJECTIONS OF APPELLANT TO THE MOTION TO DISMISS THE APPEAL—MOTION OF APPELLANT TO DISMISS SAID MOTION AND TO STRIKE THE SAME FROM THE FILES.

Before discussing the motion to dismiss the appeal the appellant states that it has no objection to the movents being permitted to file brief herein as *amici curiæ*, or to being made intervenors herein, if they so desire, with right limited to the filing of brief on the record brought here by the appellant, and further provided that the hearing and decision of this appeal shall not be delayed.

The appellants object to the motion to dismiss the appeal, and move to dismiss said motion on the following grounds:

1. The movents are neither proper or necessary parties to this apeal. The precise question was decided by this court in the case of *In re Englehard and Sons Co.*, 231 U. S. 646 wherein the court said at pages 647-651:

> The basis of petitioner's contention is that it has a common interest with the other subscribers of the Telephone Company and may therefore intervene for itself and for them. Equity Rule 38 is cited to sustain the contention. Petitioner is not seeking, however, as it says, "for itself or for any one the recovery of a specific portion of the fund". The alternative of this would seem to be the assertion of a right to intervene and become a party to all the controversies upon which the fund may depend, and this may mean either in conjunction with the city or independently of it, and, it may be, in exclusion of it. It is said that the city is acting only for the good of the public but that that is not "the criterion to determine whether the parties in interest have the representation to which they are entitled". It is further said that however earnest the city may be to obtain restitution to the subscribers of the Telephone Company, it might not appeal from an adverse ruling. Who is going to represent the subscribers, it is asked, upon the question of fees to the master and the costs, and the costs on appeal, and who raise the question of interest? This enumeration presents the purpose of the petition for intervention. In other words, the ap-

prehension is expressed and made a basis of the petition for leave to intervene, that the city, which has so far conducted the litigation—and with success—may or will relax its attention and energy to the detriment of petitioner and the other subscribers of the company. This does not present a very strong plea against the discretion the court exercised, supposing the court had discretion to grant or refuse the petition.

It is contended, however, that the court had no discretion but to grant the petition and that Equity Rule 38 was peremptory of the right of petitioner. It recognizes the principle, it is said, "that the rights of persons should not be passed upon unless such persons are before the court or are represented by some one who is interested similarly with them". And cases are cited which, it is urged, also recognize and illustrate the principle.

We have given due consideration to the cited cases and the argument of counsel, and we are of opinion that the District Court did not exceed its discretion in making the order under review. The city was the proper party to make defendant in the suit as representative of all interested, and so throughout the whole proceedings. If we may suppose in a case like the present one there can be a distinction between the public interest and private interest, the subscribers of the company being the public, the representation of both interests was adequately fulfilled. It was in consequence of the motion of the city that the telephone company agreed to keep account of charges in excess of the ordinance rates, and, if they should finally be decided to be illegal, to pay into court the excess sums for distribution among its subscribers. It was the

representative of all interests to provide for the creation of the fund; it is properly the representative of all interests to see to its proper distribution. This is a necessary deduction from the cases. It is the universal practice, sustained by authority, that the only mode of judicial relief against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them. As was said by Mr. Justice Miller in *Chicago, Mil. and St. P. Railway Co.* v. *Minnesota*, 134 U. S. 418, 460, it was not competent for each individual having dealings with the regulated company "to raise a contest in the courts over the questions which ought to be settled in this general and conclusive way". The rule has been repeated in subsequent cases.

Indeed, what issue is involved except that of the main suit—the character of the rates—that needs the intervention of the petitioner? As to who are subscribers of the company, there can be no controversy, nor as to the amounts to be returned to them.

In *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, at page 592, it is said:

Some complaint is made to the effect that the decree attempts to bind persons not parties to the suit, including the thousands of subscribers, and to prohibit appellants from enforcing in the future any legislative remedy for excessive charges, hereafter imposed, however unreasonable they may be. As to the first branch of the complaint, it is only necessary to say that the commission represents the public and especially the subscribers, and they are properly bound

by the decree. *In re Engelhard,* 231 U. S. 646, 651.

2. While the city was a proper party in the court below and on this appeal, it would not be a necessary party were it not for the impounded fund with respect to which it represents all parties in interest. In *City of New York* v. *Consolidated Gas Co.,* 253 U. S. 219, this Court said at page 220:

> The Consolidated Gas Company of New York brought suit to enjoin the enforcement of the New York eighty-cent gas law. The jurisdiction was invoked solely upon the ground that the rate was confiscatory and hence violated constitutional rights of the company. The City of New York applied for leave to intervene as a party defendant in the action. The District Judge denied the petition for intervention, stating that the Public Service Commission, the Attorney General and the District Attorney properly represented private consumers; that the City had no interest in the litigation as a consumer; was not the governmental body which had fixed the rate and was not charged with the duty of enforcing it. From the order denying the application to intervene the City of New York prosecuted an appeal to the Circuit Court of Appeals, and the latter court affirmed the order of the District Court.
>
> The application was addressed to the discretion of the District Court, and the order appealed from was not of that final character which furnished the basis for appeal. *Ex parte Cutting,* 94 U. S. 14, 22; *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 315; *Ex parte Leaf Tobacco Board of Trade,* 222 U. S. 578, 581.

In the case of *City of New York* v. *New York Telephone Co.*, 261 U. S. 312, it is said at page 315:

> The necessary defendant in the suit to enjoin the orders lowering rates was the Public Service Commission whose orders they were. In addition the counsel of the Commission and the Attorney General were made parties defendant under the legislation above recited. The City of New York has no control over the rates. Its only interest in them is as a subscriber, and even as such its interest in the general rates is not direct because its own rates are settled by a special contract. Under such circumstances, the City is certainly not a necessary party.
>
> *In re Engelhard and Sons Co.*, 231 U. S. 646, an action had been brought against the City of Louisville to restrain the enforcement of an ordinance prescribing telephone rates. One of the subscribers filed a petition in the District Court asking to be made a party defendant. This was denied and the petitioner sought in this Court a mandamus to compel the District Judge to grant the petition. It was pressed upon the Court that petitioner had a common interest with other subscribers in the rates under discussion and that under Equity Rule No. 38 when the question is one of common or general interest and it is impracticable to bring them all before the court, one may sue or defend for all. This Court held that the City was the proper defendant in the suit as the representative of all interested. We said:
>
> "It is the universal practice, sustained by authority, that the only mode of judicial relief

against unreasonable rates is by suit against the governmental authority which established them or is charged with the duty of enforcing them."

There is nothing in this case to show that the Public Commission will not fully and properly represent the subscribers resident in New York City. Indeed it was said at the bar that the City and the Public Commission and the Attorney General were cooperating in every way in the defense of the suit. It was completely within the discretion of the District Court to refuse to allow the City to become a defendant when its interests and those of its residents were fully represented under the law and protected by those who had been made defendants. There is nothing to show that the refusal complained of was an abuse of discretion. This same controversy arose in the case of the *City of New York* v. *Consolidated Gas Co.*, 253 U. S. 219, and the same conclusion was reached.

3. The movents were not parties in the court below, as shown by the certified copy of their petition to intervene and the order thereon filed herewith marked Exhibit A, and as further shown by the certificate of the Clerk filed herewith marked Exhibit B.

4. While section 37 of the franchise contract provides that any consumer or group of consumers may be made parties to any rate controversy arising thereunder, said provision is permissive only, and does not confer upon any consumer or group of consumers the right to represent or act for other consumers.

5. Section 37 is not binding upon the Commission or Court, and permission to become parties is neces-

sarily within the discretion of the Commission or Court.

6. It is not suggested in the motion that the interests of all consumers have not been ably and effectively represented and their interests fully protected by the City and its specially employed counsel, Honorable Robert H. Winn, of Mt. Sterling, Kentucky, formerly a member of the Court of Appeals of Kentucky, and by the Honorable Clinton M. Harbison, of Lexington, Ky., corporation counsel for the City of Lexington, and by the Honorable Bailey P. Wootten, of Frankfort, Ky., Attorney General for the State of Kentucky, and by the Honorable S. H. Brown, of Frankfort, Ky., Assistant Attorney General for the State of Kentucky, who also appear on the brief for the appellees.

7. It is not suggested that in the conduct of this controversy before the Commission or Court the movents or their counsel, J. A. Edge, ever introduced or offered to introduce any witness or evidence of any kind, or ever examined or cross-examined any of the witnesses introduced by either the company or the city. In fact the contrary is shown by the record brought here by the appellant, and sought to be filed here by the movents.

8. While the portions of the record before the Commission and before the Court below now sought to be filed by the movents, show that said movents or some of them did file with the Commission certain alleged pleadings, and did file with the Clerk of the Court below certain alleged pleadings, said record also shows

that no action was ever taken thereon by the Commission, and that no notice was given to or action taken thereon by said Court.

9. While the portion of the record in the lower court filed by the movents show that some of the orders were signed by the attorney for said movents and that certain letters addressed by the Court to counsel representing the actual parties were also addressed to said J. A. Edge, counsel for said movents, said participation and recognition were merely as a courtesy and not because of separate or independent right or interest of said movents.

10. While it is asserted in paragraph 2 of the motion to dismiss that the Railroad Commission refused to take jurisdiction of this rate controversy until compelled by mandamus proceedings to do so, the record brought here by the appellant and the record now sought to be filed here by the movents conclusively show that said assertion is inaccurate.

11. While movents assert in paragraph 3 of their motion that "* * * said impoundings and related proceedings were all made upon the application of these movents," the record filed here by appellant and the record now sought to be filed here by the movents show that the impoundments made while this controversy was pending before the Commission and in the court below, were the result of the express provisions contained in the franchise contract, Section 4 (E) (R. 32) and were had upon the initiative of either the appellant (R. 75) or of the City (R. 14).

12. Appellant moves the Court to strike from the files the motion to dismiss and all of the papers attached thereto and sought to be filed herein on the ground that said motion and the affidavits filed in support thereof contain impertinent and scandalous matter, particularly in paragraphs 2 and 5 of said motion, and in the affidavits of J. W. Hardy, Wm. C. Wilson, and Jos. W. Delph.

HENRY T. DUNCAN,
DYKE L. HAZELRIGG,
CHESTER J. GERKIN,
Counsel for Appellant.

LEXINGTON, KY., May 8, 1933.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 779

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

v.

RAILROAD COMMISSION OF KENTUCKY, *et al.*,
Appellees.

REPLY BRIEF FOR APPELLANT

It is not easy to follow some of the reasoning, to discover the relevancy of much of the discussion and citation of authority, or to harmonize many of the contentions and observations contained in the brief submitted by appellees. A considerable portion of their brief is devoted to matters outside the record, and throughout contains many unjustified claims and unsupported statements and figures. Many of the arguments advanced are too fanciful for serious consideration.

The effort of appellees to support the trial court in what it said in its opinion about being requested to

determine a rate as of December 31, 1926, and in centering its argument upon an extremely narrow interpretation of what the court actually did, if successful, would defeat the very purpose and intent of the parties to this controversy and destroy the contract between them. In equity and good conscience the city should not be permitted to accomplish that end.

There is much more involved in this case than the mere determination of just and reasonable rates as of or for a date certain. The governing principles are of much broader scope, and whether based upon equitable rights or upon the very terms of the contract itself the goal is the same, namely, the determination of fair compensation (just to both parties) for the gas service rendered and received.

So much undeserved importance has been attached to specific dates rather than to a period of time that the real question here involved has perhaps become obscured; in fact, obliterated if the lower court's conclusions are permitted to stand. It is, and we say this with all due respect, occasioned by the attempt of the court to defend its result by the adoption of a wrong premise (the alleged request of the parties to determine a rate as of December 31, 1926) when in fact it sought to determine just compensation for services performed over the considerable period of time involved. What the court *says* it did or what *reason* it assigns therefor is not vital. The important thing is what it actually *did,* and was justified or required to do under the facts in this case.

The applicable law required the court to determine the compensation due the company under all the circumstances shown to have a bearing upon the question (and under average or normal conditions) notwithstanding it says the parties asked it to adopt a particular date. It did not in fact do what it says the parties asked to be done, and our complaint is that while it appears to have adopted the correct principle it failed to consider some of the operating cost factors essential to a correct determination of just compensation in the application of that principle.

COST OF GAS

We shall not discuss the matters dealt with in the city's brief in the order presented, but come first and directly to the main question of whether the cost of the Owsley County (Petroleum Exploration) gas should be considered in determining reasonable rates for the company's gas service.

The following facts are not in dispute:

1. This rate controversy arises under the Franchise Contract; also, Section 23 of that contract required the company to secure the Owsley County gas, and the company complied with this obligation which resulted in fixed annual expenses of $300,000.

2. Delivery of this gas began in November 1927, and by reason thereof the temporary rate of 60 cents went into effect on December 1, 1927.

3. The franchise contract provides for just and reasonable rates and the controversy from the beginning

has been over the fixation of such rates for the gas service rendered by the company under said contract.

4. In the trial of this case before the Commission, and before the Statutory Court on the same evidence, and at all times the city conceded that in determining reasonable rates for the company's gas service full allowance should be made for the cost of the Owsley County gas.

5. Under the pleadings the issue before the Statutory Court was the vadidity of the Commission rate for the full period to which it applied its rate, namely, from the contract date to the date of the Commission order.

6. The parties agreed that the court should determine the rate base as of December 31, 1926, and adopt that value for all purposes of this case.

7. Neither party made any request whatever that *income* be determined as of any particular date.

8. Under the issue presented by the pleadings the right to the impounded funds depended on the determination of reasonable rates making allowance in operating expenses for the cost of the Owsley County gas.

The only reference to income in the court's opinion is in connection with its discussion of the United Fuel contract and the city's contention with regard thereto. The court said:

> "That relationship did not exist prior to 1928 and inasmuch as we are asked to fix the rate base and determine the income as of December 31,

> 1926, * * * we should accept the contract price of gas purchased from United Fuel as part of the cost of operation" (R. 85).

The city does not contend that the court was in fact asked to determine the company's *income* as of December 31, 1926, or that its recital to that effect is anything more than its own conclusion as to the effect of the request of the parties to determine the *rate base* as of that date.

The city did contend that in determining the validity of the Commission rate the court should not allow in operating expenses the contract price for the United Fuel gas. The fact that this contention was made is inconsistent with any claim that the court had been requested to determine "income" as of December 31, 1926, and since the intercorporate relation did not arise until January, 1928 the city's argument proves beyond doubt that no such request was made.

The city's contention concerning the United Fuel gas also conclusively shows that it expected the court to make full allowance for the Owsley County gas because the intercorporate relation on which its contention was based arose *after* the cost of said gas began; and establishes with equal certainty that what was said by the parties with reference to the rate base was never for a moment considered by them as having the slightest bearing on the right of the company to be allowed the cost of the Owsley County gas in determining the validity of the Commission rate, or the reasonableness of any other rate for its gas service.

It would seem that the court below construed the request of the parties to determine the value of the property as of December 31, 1926, involved as a legal consequence a request to make all findings as of that date. The company insists that no such legal consequence followed from the request to determine the rate base as of December 31, 1926.

It is now apparent that the city, although it conceded prior to the court's opinion that full allowance should be made for the Owsley County gas in determining a reasonable rate for the appellant's gas service, would shelter under the construction which the court has attributed to the request of the parties relative to the rate base, and thus retain an advantage wholly unexpected and to which it is not entitled. The city having contracted for a particular service for which it agreed to pay, would now, after having secured the benefits of such service avoid paying for it.

While the city in its brief attempts to sustain the literal accuracy of the court's statement as to what was "asked" or "requested" by the parties, no defense is offered for the exclusion of the cost of the Owsley County gas as a matter of legal right.

If the court actually intended to exclude the cost of the Owsley County gas in its estimate of the probable results of the 50-cent rate, why did it include in its estimated net income of $144,574.00 for 1927 the amount of $47,485.34 actually paid for that gas delivered in December of that year? And if the court in concluding a 50-cent rate would be reasonable ac-

tually intended to exclude the cost of the Owsley County gas, why did it not explain or defend its action on that ground?

If the rejection of the company's estimate of return set forth in Exhibit No. 6 was at all influenced by the fact that this statement made full allowance for the cost of the Owsley County gas, why did not the court call attention to that fact and base its rejection of the estimate on that ground?

While it is stated in the opinion that the parties requested the court to fix the rate base as of December 31, 1926, and to determine income as of that date, *the court itself did neither.* It took the sale price as of January 1, 1928, and the net income arrived at by it under the temporary rate for the year 1927. The court, in its attempt to determine a just and reasonable rate under the franchise contract included *the cost of the Owsley County gas* for one month in 1927 which is all that was reflected in that year's business. This is the method contended for by appellant and for which it argued in its brief filed in the court below (from which counsel for the city have quoted in their brief filed here), the error consisting in not making allowance for the *full* annual cost of the Owsley County gas.

What did the court mean when it said it had been asked to determine income as of December 31, 1926? If the court meant literally that income should be ascertained as of that date, then it would have taken the actual results under the 50-cent rate for 1926. But the court specifically rejected that basis (1926 not being an average or normal year).

Did the court mean that it was asked to exclude from consideration anything occurring after December 31, 1926, which would affect net income even though specifically required by the contract? If so, such construction did clear violence to the actual position and manifest expectation of the parties since they were agreed that in determining income full allowance should be made for the cost of the Owsley County gas. Furthermore, the city was contending that allowance should not be made for the United Fuel gas on the basis of the contract price, and was justifying this contention upon the theory that the court should hold the United Fuel Gas Company bound to furnish appellant all the gas it needed at a lower price because of the corporate affiliation which did not arise until January, 1928.

Obviously the parties did not intend to abandon their long assumed positions, or contemplate that the request made relative to the valuation date should have such legal effect. That no such thought existed in the mind of counsel for the city is perfectly clear from the fact that they contended no allowance should be made for the United Fuel gas in excess of 12½ cents. The brief of the city filed here shows it is still contending for this position. Although the intercorporate relation did not arise until a year after December 31, 1926, the city was insisting it should be given effect *as of the franchise contract date.* Thus the city was urging that events occurring *after* the franchise contract date should be given full effect as of that date.

It is true that the court in rejecting the city's contention, regarding the United Fuel contract stated the intercorporate relation did not exist as of December 31, 1926, but the true ground of decision would have been and is that the intercorporate relation could have no effect on that contract regardless of the date when such relation began. That gas purchase contract was made at arm's length. It bears date of November 1, 1912, and provides that—

> "* * * this contract shall continue for the term of twenty years from its date and so long thereafter as the United Company produces gas in marketable quantities from its gas properties in West Virginia and Kentucky" (R. 242).

Let us assume the intercorporate relation had arisen *before* the date of the franchise contract, and that while the company, because of the added supply from the Petroleum Exploration, did not require from the United Fuel as much gas as before, yet it did need a large quantity from that company in order to supply its customers. Let us further assume, which is the fact as clearly appears from the record, that appellant could not nearly supply its markets without the United Fuel gas. The evidence shows that this source of supply had been the very backbone of the company's ability to render service since 1912, and that without such gas appellant would long since have been wholly unable to furnish natural gas to its Lexington consumers.

If by reason of the intercorporate relation the United Fuel had declined to furnish any more gas under the contract there would have been an instant and rightful protest on the part of the City of Lexington. Had the appellant acquiesced in such position and attempted to release the United Fuel from its contract obligation, thus surrendering this gas and reducing its ability to supply its demand, the courts would have given immediate relief and compelled specific performance of that contract.

But in compelling specific performance would the court enforce the contract as written and require the appellant to take the minimum amount stipulated and pay the contract price, or could the court have required the United Fuel to furnish appellant gas at such times and in such quantities as it might need and fix the price therefor at 12½ cents? The answer is obvious.

The appellant therefore contends that in rejecting the city's contention relative to the United Fuel contract, the court was right in assigning as a reason therefor that the contract was one made at arm's length but was clearly wrong in giving as a reason that it was asked to determine income as of December 31, 1926.

In support of its contention relative to the United Fuel contract the city cites the decision of this Court in Western Distributing Company v. Public Service Commission of the State of Kansas, 285 U. S. 119. The facts in that case are not parallel. An essential point of difference is that in the Western

Distributing Company case there was no continuing or enforceable contract which had not expired. In that opinion the Court said:

> "The current price is 40 cents per thousand cubic feet which is what was agreed to *under a day to day verbal contract.*"

It was by reason of the fact that there was no definite or fixed contract obligation that the Court supported the Kansas Commission in the position it took that the company should be required to justify the city gate price of 40 cents.

Counsel for the city have quoted a portion of the company's original brief in the court below in support of the court's statement that it was asked to determine the income as of December 31, 1926 (R. 85), and determine whether the rate established by the Commission afforded a reasonable return on said date, as against our contention that no such request was made.

We welcome the reference to the company's brief in the court below, and trust this Court will find time to read that brief in its entirety, and then determine whether the inference now sought to be placed on the quoted portion of that brief justifies in the remotest degree the conclusion sought to be drawn therefrom that the court was asked to determine the validity of the Commission rate as of December 31, 1926.

The portion of the brief which counsel for the city now quote was part of an argument beginning at page 53 under the heading

and was addressed particularly to the proposition that under the terms of the franchise contract, and by reason of the impounded funds which the parties had voluntarily brought in and placed *in custodia legis*, the question of just and reasonable rates was a judicial one, and that the court could properly determine what rates would be just and reasonable under the evidence submitted and apply same for the contract period and thus dispose of the impounded funds which had accrued.

As bearing on that question and also on the proper construction to be placed on the quoted portion of the company's brief we quote what was said at pages 55, 56 and 57 of that brief:

> "We therefore assume that the Court will specifically find, (a) the rate bases, (b) the rate of return, (c) allowance for amortization and depletion, extraordinary maintenance and contingencies, (d) the actual revenues under the forty and fifty-cent rates, (e) *the probable revenues and per cent return under the forty-five-cent rate,* (f) *the probable revenues and per cent return under the second, and perhaps also under the first schedule of rates and charges promulgated by the company,* (g) the right of the Company to promulgate a rate schedule including a service charge instead of a flat rate, (h) *whether the actual revenues under the experience rates have*

been sufficient, or whether the *probable revenues under the first* or second *schedules promulgated by the Company will be sufficient to yield an adequate return* on the total valuation as fixed by the Court.

Depending on the Court's actual findings on the foregoing points must be determined the character and scope of relief the Court should grant. The question of relief we desire to discuss on varying hypotheses, as follows:

1. Assuming the Court will find that the forty-five cent rate ordered by the Commission will not produce revenue sufficient to yield the rate of return as fixed by the Court, on the value of the property used and useful as fixed by the Court, it follows that the Court will adjudge the forty-five cent rate to be confiscatory, and grant a permanent injunction against the enforcement of such rate. This proposition requires no argument.

2. Assuming that the Court will find that under neither of the two schedules of rates promulgated by the Company will the estimated revenues, as found by the Court, be sufficient to yield the rate of return, as fixed by the Court, on the rate base as found by the Court, the Court should specifically adjudge,

(a) That the Company has the contract right to determine its own rate structure, including a service charge, provided only the rates and charges are just and reasonable;

(b) That the schedule of rates promulgated by the Company, including the service charge, are just and reasonable.

(c) That the impounded money be paid to the Company.'

3. Assuming that the Court should find the forty-five cent rate is too low, that both the first and second schedules promulgated by the Company are too high, *may the Court ascertain and fix the just and reasonable rates as of the contract date* and distribute the impounded moneys on the basis of such rates and charges?

We shall discuss the questions above suggested under the following propositions,

A. The Company has the contract right, as well as the statutory right, to declare its own rates and charges, and if such rates and charges are in fact just and reasonable the Railroad Commission has no power to disturb them.

B. That an injunction should issue restraining the Commission from entering any order denying the Company the right to make a service charge, or from charging a higher rate for a small quantity of gas, and lower rates for larger quantities.

C. That the rates and charges promulgated by the Company are in fact just and reasonable; *that such rates apply from the date of the contract;* that the impounded moneys should be ordered paid to the Company; that such rates are binding on the parties for a period of two years after the final judgment of the Court under the contract agreement.

D. That the question of just and reasonable rates and charges as of the contract date has been made by the parties a judicial question under the franchise agreement, and the Court may there-

fore, *independently of temporary rates or promulgated rates and charges, ascertain and fix the just and reasonable rates and charges as of the contract date;* that such judicially determined rates and charges become binding on the parties for two years after the date of the decree because of their agreement to that effect, and the impounded moneys should be distributed on the basis of the rates and charges as fixed by the Court."

Again the following at page 61:

"It is our contention that the Court may in the instant case judicially determine just and reasonable rates and charges as of the contract date, and that such rates and charges so fixed by the Court become binding on the parties for a future period of two years under the provisions of Section 7 of the franchise ordinance; and that such court fixation would be a judicial act and not a legislative act."

Again at pages 63 and 64:

"But even though both sides are fully agreed that they intended by the franchise contract to submit to the Court the final determination of the rate question, and that the Court should by its decision fix just and reasonable rates and charges as of the contract date, nevertheless it must be conceded that unless the Court shall construe the contract as in fact submitting this question to it for decision, and shall further conclude that such decision by the Court shall be the exercise of the judicial function, and not the attempted exercise of a legislative function, the Court may

properly decline to go further than to enjoin the enforcement of the forty-five-cent rate, *unless it shall also find either that the temporary rate of sixty cents will not produce an adequate return, and is therefore less than a just and reasonable rate, or shall find the Company rates will not yield an adequate return and are therefore at least just and reasonable, and in the event of either of said findings the impounded fund would belong and be ordered paid to the Company.*

That the parties have intended and attempted to agree that the Court should fix just and reasonable rates as of the contract date will, we believe, sufficiently appear from the contract, and this we shall now endeavor to show.

The contract clearly discloses the expectation of both sides that the Company would promulgate rates and charges *at least equal to or in excess of the highest temporary rate of sixty cents;* that the City would not accept such rates as satisfactory and would immediately file its complaint before the Commission, upon the filing of which the agreed temporary rates would at once apply, so that there would be no period of time when the Company rates would be collected, but that such rates would remain suspended until there should be a final determination of the rate controversy and a final fixation of rates either by the Commission, or by the court to which either of the parties might go as against the Commission rate, and *that the rates and charges as finally fixed by the Commission or Court should apply as of the contract date,* and the impounded fund distributed on the basis of such rates and charges."

We think it sufficiently clear from the foregoing that appellant's argument was in substance that the court should under all the evidence, in the light of the actual experience and results under the temporary rates, and the probable results under the Company's promulgated rates, fix just and reasonable rates for the gas service *as required by the franchise contract* and apply those rates to the contract date. We also think it clear that there is nothing in the portions of the company's brief quoted by the city which justifies the inference that the court was asked to determine the reasonableness of the Commission rate as of December 31, 1926, or to justify the inference that in determining the fair rates the court should disregard the cost of the Owsley County gas.

But to make this even clearer we invite attention to the following additional portions of the company's brief filed in the court below.

First, from pages 7 and 8:

> "During the negotiations for the new franchise strenuous objection was made to any substantial increase over the old rate of forty cents on the ground that the Company had for years, at times of extreme cold weather, when the gas was most needed, been unable to supply or deliver gas in such quantities, or at such pressure, as would supply the demand, causing much inconvenience and some hardship. In order to meet this complaint the Company *gave definite assurances* that *if granted a new franchise and adequate rate* it would be able to supply the peak demands in

cold weather *through an arrangement with the Petroleum Exploration Company*, which had recently developed a promising field in Owsley County, *to build an independent line to Lexington* and deliver gas to the Company at that point, *thus assuring the City of a supply of gas from two separate sources of supply, one through the new main to Menifee County, and from there on to Inez. It was stated at the time that the Company would have to pay forty cents for the Owsley gas* delivered at the Lexington gate. Being unwilling to rely entirely on the Company's assurance of its purpose to secure this Owsley County gas for Lexington, *the franchise ordinance was drawn so as to impose on the Company a contractual obligation to do so*, and while the City was willing to agree to a temporary rate of fifty cents until the rate question had been settled, it was unwilling to agree that the temporary rate should go to sixty cents until the gas from the Owsley field was actually delivered. This explains why the ordinance provides for the two temporary rates of fifty cents and sixty cents."

The accuracy of the foregoing statements was never questioned by the city, as will be seen from a reading of the city's brief in the court below (referred to later herein).

Then this from pages 10 and 11:

"For the purpose of this controversy the parties have directed their evidence of *values* to a date certain, namely, December 31, 1926, that being the nearest convenient and logical date to the

contract date. *The rates finally* to be *determined must relate back to the date of the contract, for two reasons, first, because this is pursuant to the franchise agreement; second, the Court has before it an impounded fund which may not be distributed, unless and until the Court shall find what rates are just and reasonable from and after the contract date.*"

A perusal of the city's brief in the court below will disclose that the correctness of the foregoing statement was not questioned.

And from page 37:

"The per cent returns are given in Kimball's Exhibit No. 5, the highest of course being under the 50-cent rate for 1926. That year however was quite abnormal in that the temperatures were much lower than the mean, thus greatly increasing the consumption of gas. Furthermore *this was prior to the contract made with Petroleum Exploration Company pursuant to the franchise requirement*—for gas to be delivered from the Owsley field at the Lexington gate and for which the Company pays 40 cents. *The cost of this gas greatly increases the operating expense and consequently greatly reduces the net revenues available for return. The net revenues therefore under the 40-cent and 50-cent rate for 1926, based on actual operations furnish no adequate guide or assistance in determining the probable revenues for the average year under either the first or second promulgated schedules, for in estimating such revenues it is obviously necessary to base such es-*

timates on normal or average weather conditions, and to make proper adjustments, among others, for the increased cost of gas."

The city never took issue with the above statement.

In view of the foregoing, is it possible that the excerpts from the company's brief quoted by the city is susceptible of the meaning now sought to be given them? Or that they support to the slightest extent the contention that "the parties" did in fact request the court to determine the income as of December 31, 1926, or to determine the validity of the Commission rate as of said date?

The appellant stands four square on everything stated in its brief filed in the court below. And by the same rule the city should be willing to stand on everything appearing in its brief filed in the court below, a copy of which is filed with this brief marked Appendix A. We quote the following from pages 7 and 8 of that brief:

"Cleared of all cloud, disregarding for the time what may be called the largely unimportant sidelines, the work of the court is to ascertain and apply from the record these simple fundamentals:

First. The value of the property of the Central Kentucky Company allocable to Lexington.

Second. *The company's proper and necessary annual expenses and charges, essential to its Lexington business.*

Third. *The rate at which it must sell its gas,* in order (a) *to take care of these annual expenses*

and charges, and (b) on top of them to earn a reasonable return on the ascertained value of the Company's property allocable to Lexington.

For the sake of emphasis and clarity let us restate this in another way:

The court is first to ascertain the value of the Gas Company's property allocable to Lexington. *It is next to ascertain the annual total of expenses necessary to run the business and keep up the property* and finally to find at what price the company must sell gas at Lexington *in order to pay these annual charges,* and to earn the company a fair rate on its ascertained values at Lexington."

Then this from pages 9 and 10:

"Next, with the illustration, we find *what the annual expenses and charges are.* We find them thus (see same Carter Ex. 7, pp. A 1, A 2, and A 4, and as revised):

* * * * * * *

Cost of 750,000,000 cu. ft. gas purchased (Owsley Co.) @ 40 cts. per M. $300,000.00

* * * * * * *

The foregoing calculation has been put in by us rather out of order, in the hope that it would serve as a map and guide for all that field into which this controversy brings us, to manifest that what we must get at is (a) the value of the property, (b) *the annual charges,* and (c) the price at which gas must be sold to *pay these charges* and a fair earning on this value."

And this from pages 33 and 34:

"(a) Upon an inspection of the Kimball table (his Exhibit 4, Sheet 14) it will be found that, outside of the United Fuel, not exceeding 10 cents was paid to any companies other than (1) the Kentucky Cities, (2) the Bed Rock, (3) the Petroleum Export (the Petroleum Exploration?), (4) the Hillsdale Company, and to Lewis Vincent. If we turn to the gas purchase contract exhibits, filed by the Central Kentucky in this record in response for a request that all of its gas purchasing contracts be filed, we find upon (1) the Kentucky Cities contract an endorsement that it has been cancelled. We find (2) a Bed Rock contract in the record. The price was originally 8 cents which seems to have been raised voluntarily to 12 cents. We find (3) no Petroleum Export contract in the record; *and if the Petroleum Exploration be meant, its contract for the 40-cent gas is taken care of upon the face of Mr. Carter's computations.* We find (4) the Hillsdale Gas Company contract in the record to provide for a maximum of 720,000,000 feet per annum, while as a matter of fact in the very second year of the contract it dropped below that amount (to 560,000,000); * * *

The result, therefore, is that the Central Kentucky is bound by contract to take not a foot of gas from any person or company *save the Owsley County gas* and possibly the Hillsdale; and as well it can supply (*save for the Petroleum Exploration* and possibly the Hillsdale contracts) every bit of the gas it sells directly from its own field, the United Fuel-Columbia-Central Kentucky gas wells

and fields. And buying gas elsewhere at 10 cents, it is hardly in position to contend either that its own gas is worth exceeding 12½ cents, or that it has the right to an income based upon any gas outlay (*other than the Owsley County gas*) in excess of ten cents per thousand."

And from pages 36 and 37:

"Second. *Mr. Carter allocated the high-priced Owsley County gas, just as he did all gas,* in these rate-of-return figures. The Central Kentucky intimates that because Lexington's franchise demanded the additional pipe line, *all the 40-cent gas coming through that line must be charged up to Lexington for rate-making purposes.* But here are the difficulties about that:

(a) The Owsley line interconnects with the company's main line just east of Lexington.

(b) The gas going into the line there must be an intermingled part of that flowing on beyond to Versailles, Frankfort and Georgetown.

(c) *The Mount Sterling franchise in the record demands the Owsley County gas, just precisely as does Lexington;* and that gas must be a commingled part of the Winchester, Paris, Cynthiana, and Mount Sterling supply."

Section 23 of the Mount Sterling franchise referred to appears in the record (R. 237). That section is identical with the same numbered section in the Lexington franchise, and as above shown was construed by the city as specifically *"demanding the Owsley County gas."*

It thus appears that both the city and the company agreed at all times that in the testing of the Commission rate, and of the company's promulgated rates; and in the fixation of reasonable rates, whether by the Commission or Court, full allowance should be made for the cost of the Owsley County gas. The city may not now contend that the Court below in determining a reasonable rate for the appellant's gas service was justified in not making full allowance for the cost of the Owsley gas. We quote the following apt and correct statement from the city's brief (page 43) filed herein:

> "That a party may not thereafter alter a position taken by him in a legal proceeding needs neither argument nor authority."

APPELLEES NOT ENTITLED TO FILE POINTS ON WHICH THEY INTEND TO RELY IN THIS COURT

The city's brief contains extended discussions of errors alleged to have been made against it by the court below notwithstanding it did not appeal. The city admits that the record brought here by it (appellee) on amortization and property values is incomplete. It contends that this is the fault of the appellant as the company had notice in the court below that the city intended to urge the alleged errors which it discusses in its brief filed in this Court, and that the appellant, if it desired additional portions of the record bearing on these matters, should have requested the incorporation thereof.

The first notice of the errors which the city intended to urge here in support of the decree below was the formal notice lodged with the Clerk of this Court and served upon the appellant after the record on appeal was filed. This notice consisted of a paper designated "Statement by the Appellees of the Points on which they Intend to Rely", which was filed with the Clerk on March ——, 1933. The Clerk was requested by the city to have the same included in the printed record. This request was refused by the Clerk because the Rules do not provide for the printing of a statement of points to be relied upon by an *appellee*.

The theory of the city appears to be that it may under the Rules, without taking an appeal, include in the Statement of Evidence such portions of the record which it desires bearing on errors alleged to have been made against it, the nature and character of which would at the time such amendment was offered be left entirely to be conjectured by the appellant. If such theory be correct, it would result in conferring upon an appellee the right to shape the record to be taken up by the appellant precisely as if a cross-appeal had been taken, and thus include perhaps a great amount of evidence in no way essential to the actual appeal.

It is argued that the appellant could have amplified the record so as to include such additional evidence as it might surmise would be needed in the discussion of unassigned errors which might be

urged by the appellee. There are several answers to this contention: first, there is no authority therefor under the Equity Rules, or under the Rules of this Court; second, the appellant, if it attempted to make further amendment to the Statement of Evidence, would be compelled to do so upon a mere conjecture as to what were the precise points or errors which the appellee might ultimately decide to urge in the Appellate Court; and third, the appellant would be thus forced to file a further amendment to the appellee's amendment to the Statement of Evidence without the latter being required to take an appeal or assign any errors.

Equity Rule 75 must be complied with, and provides that:

> "(b) The evidence to be included in the record, * * * shall be stated in simple and condensed form, *all parts not essential to the decision of the questions presented by the appeal being omitted* * * *. *The duty of so condensing* * * * *shall rest primarily on the appellant,* * * *. * * * the statement, together *with any objections made or amendments proposed* * * * shall be presented to the court * * *. When approved, it shall be filed * * * and become a part of the record *for the purpose of the appeal.*"

Equity Rule 76 requires that:

> "* * * care shall be taken * * * to exclude the formal and immaterial parts of all exhibits, * * *."

The appellant has complied with the requirements of the above Rules and with the provisions of Rule 10 of this Court. In *Newton v. Consolidated Gas Co.*, 258 U. S. 165, 174, it was said:

> "These rules were intended to protect the courts against useless, burdensome records, and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial courts should enforce performance of this plain duty."

Since the record brought here does not contain any portion of the appellant's evidence touching the alleged errors now complained of by the city, we do not feel called upon to follow the extended discussion, calculations and figures contained in the brief for the city on property values, amortization, etc. While there are quite a number of inaccuracies in the statements relative to what the evidence was or was not, and many calculations based on unwarranted assumptions, we do not deem it necessary or proper to discuss the same in the absence of the full record and of proper assignments of error.

DUE PROCESS

The earlier portion of the city's brief is devoted to a discussion of the proposition that whenever a Public Service Commission affords a "due process hearing", and fixes a rate for the service, there can be no Federal question by reason of the rate itself, and that a court of equity can not enjoin the enforcement of such rate unless it shall find the rate was fixed arbitrarily

and without proper evidence. That is, if it appears that the Commission granted a hearing and that the rate was not fixed arbitrarily or without evidence, the rate itself cannot be attacked as a violation of the Fourteenth Amendment even though such rate would result in depriving the utility of its property without just compensation.

This theory was pressed by counsel upon the court below and was rejected. It was fully and conclusively answered in the opinion of the court below on the question of jurisdiction, 37 Fed. (2d) 938. (R., pp. 61, 74). Some of the terminology in the city's brief might suggest the inference that the Railroad Commission, being a constitutional body, is vested with *judicial* powers and that its rate decisions are final and *res adjudicata*. The Kentucky Court of Appeals has held otherwise. In the case of *L. & N. Railroad Co.* v. *Greenbrier Distillery Co.*, 170 Ky. 775, at 785 and 786, 187 S. W. 296, the Court said:

> "The Railroad Commission, as an instrumentality of the government, was created in this state previous to the adoption of the present constitution by an act of the General Assembly. It was a creation of the legislative department of the government and so remained until the adoption of the present constitution, when, by section 209, of that instrument, it was made one of the permanent governmental agencies and was invested with such powers and duties as might be bestowed upon it by law, and until otherwise provided by law, it was granted such powers and jurisdiction, and was authorized to perform the same duties as it

was authorized by law to exercise and to perform at the time of the adoption of the constitution. Among other powers and jurisdiction it then possessed, was to render awards in favor of persons against the railroad companies for extortion. Act of April 6, 1882, as amended by act of March 7, 1890; I. C. R. R. Co. v. Paducah Brewery Co., *supra*. The power to make an award, however, as it is provided that the Railroad Commission shall make awards on account of extortion, *is not a judicial power, and in making an award it does not exercise judicial functions.* It is true that the statute provides, that upon a complaint of extortion it is made the duty of the commission to give the party of whom complaint is made, notice for ten days, and to hear such arguments, statements and evidence as may be offered, and if it finds that the rates complained of are extortionate, to fix a just and reasonable rate, and the carriers must not then charge more than the rate so established. This, however, is the exercise of a legislative power, and the duty of making investigation of the causes of complaint, as a basis upon which to rest the needed legislation, is no more the exercise of a judicial power than a legislative body exercises when it makes an investigation to determine the necessary and proper legislation to right any sore, which is upon the body politic.

* * * * * * * * *

When the commission makes a reparation award it does not *judicially determine anything. It gathers and preserves the evidence necessary upon which to base judicial action.* It collates the facts and sums up the results from the basis from which it acts, and this is presented to a *court for*

review, with ample opportunity for each party to have his day in court before the matter is determined alone by the court. The act of the commission in making a reparation award has no enforceable effect, until it is determined by the court, that its report of the results of its investigation is correct.

The Railroad Commission, in establishing a rate order, exercises a legislative power, which is delegated to it by the legislature, and its act, if done in accordance with law, is a valid and enforceable act of legislation. McChord v. L. & N. R. R. Co., 183 U. S. 483; C., N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 167 U. S. 479. Hence, a rate charged in excess of that fixed by the commission was unlawful and extortionate. Hence, the reasonableness or unreasonableness or confiscatory character of the rate order, or the arbitrary conduct of the commission in establishing it, was not, in the proceeding in the court below, a subject of inquiry. L. & N. R. R. Co. v. Garrett, 231 U. S. 229. It is not intended, by the foregoing, to say that the carrier is without remedy against a confiscatory rate prescribed by the legislature, *or a confiscatory or arbitrary rate order established by the Railroad Commission,* as the courts have the power to relieve against such injustice, but the act of legislation must be assailed by an action for that purpose, as by a suit in equity, in a court having jurisdiction, which can for once and for all determine its validity. St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649; Chicago, M. & St. P. R. R. Co. v. Minnesota, 134 U. S. 418; L. & N. R. R. Co. v. Garrett, 231 U. S. 229."*

*Italics used in this brief are ours.

It is well settled that in order to constitute *due process* in cases of this character the utility must be afforded adequate opportunity for testing judicially an order of the Commission alleged to be confiscatory. As stated by this Court in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289: "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, 14th Amendment."

THE EQUITABLE MAXIM

On page 61 of their brief the appellees say:

> "The exact application of the maxim here was, in the court's view, that fifty cents was enough; that any less would not be enough, and that any more would be too much; and the court's opinion and decree worked out a calculation arriving at that result. * * * Under the authorities it particularly is within the province of courts of equity to grant injunctions on condition."

We set forth the facts and authorities justifying and requiring the granting of a permanent injunction in this case at pages 68 to 76 of our original brief. In addition to the cases there cited we invite attention to two others in support of appellant's contention that the trial court erred in refusing to enjoin the Commis-

sion rate unless the company agreed to accept the rate fixed by the court. In *St. Louis, I. M. & S. Ry. Co.* v. *Bellamy,* 211 Fed. 172, the court said:

> *"There can be no doubt that the court in granting an injunction has the power to impose reasonable conditions, as the writ of injunction is not a writ of right but one of discretion; but that does not mean an arbitrary discretion, dependent solely on the whim of the chancellor. It means a sound, judicial discretion, informed and directed by the established principles, rules, and practice of equity jurisprudence. This question was fully discussed in the opinion filed in this case in 168 Fed. 720, where many authorities are cited. To grant an injunction upon such conditions that the party asking it waive its defense and concede its liability, when that liability is one of the main questions in issue, would be a travesty on justice and as much a deprivation of its property without due process of law as was the act condemned in Hovey* v. *Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. Of what benefit is the injunction to the complainant if at the same time it must, in effect, pledge itself to confess judgment?"*

While there are cases supporting the imposition of terms in the granting of a preliminary injunction, we have found no case holding that when a rate order is held to be confiscatory the court may impose conditions in granting a permanent injunction. The distinction is pointed out in *In Re Arkansas Railroad Rates,* 168 Fed. 720, at pages 723-724. We quote:

"From these authorities it may be stated that a court when called upon to grant a preliminary injunction, may impose such terms, on granting it, as will protect the rights of the defendant as well as those of the complaining party, and if, after the temporary injunction has been granted, and before a final hearing, while it is in force, it is shown to the court that great injustice is being done by reason thereof, that the acts of the plaintiff are unjust, oppressive, and unmindful of the rights of the defendants, the court may modify it by imposing terms which will prevent such injustice.

This leaves for determination another very important matter. Can the court, for the purpose of requiring the complainant, who obtained the preliminary injunction, to do equity and preventing the imposition of extortionate rates for the carriage of freight and passengers, fix maximum rates beyond which complainants must not go during the pendency of the litigation, and make a compliance with these rates a condition upon which the temporary injunction will be continued? * * * Upon final hearing the court must, if it is shown that the commission rates are compensatory within the meaning of the law, dissolve the preliminary injunction *or make it perpetual if they are found to be non-compensatory, and therefore confiscatory. The authorities are not only numerous, but harmonious, on this subject.* A few of the leading and late cases is all that it is necessary to cite on the subject. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 400, 14 Sup. Ct. 1047, 1054, 38 L. Ed. 1014; Interstate Commerce

Commission v. Ry. Co., 167 U. S. 479, 499, 505, 17 Sup. Ct. 896, 42 L. Ed. 243; Prentiss v. Atlantic Coast Line, 211 U. S. 210, 226, 29 Sup. Ct. 67, 53 L. Ed. .... But when the application is for a temporary injunction, the rule is different."

COMPANY'S PROMULGATED RATE

In questioning appellant's contention that it has both the contract and statutory right to fix its own rates or rate structure the city makes reference to the "service" or customer charge of 75 cents contained in the company's second schedule. A word of explanation is perhaps necessary in order to avoid misunderstanding on this matter. The rates promulgated by the company pursuant to the franchise contract (Sec. 4B) (R. 32), are the rates appearing in this record (R. 110). During the progress of the hearing the company filed a second schedule which it has abandoned. Therefore the discussion in the city's brief relative to the "service" or "customer" charge contained in the so-called second schedule needs no response.

The appellant in its main brief does not contend for the validity of any specific customer, service, or minimum charge. It merely claims the right under its franchise contract and the statute to promulgate its own schedule of rates, and that such schedule may properly contain a minimum and/or service charge, and higher rates for smaller quantities of gas and lower rates for larger quantities, provided the net

revenue resulting from such rate schedule does not exceed a fair return.

SEQUENCE OF EVENTS

At page 44 of the city's brief is set out the sequence in point of time of certain events and reference is made to conditions or conditions subsequent. The employment of the phrase "condition subsequent" is inapt if it is intended to have any special significance as bearing on appellant's contract rights.

While the coming in of the Owsley County gas is an event occurring subsequent to the contract, it is not a condition subsequent. It is in fact the performance of a condition precedent by reason of which arose the right of the company to demand and the obligation of the city and other consumers to pay reasonable rates based on the performanec of such requirement.

At the time the company promulgated its first schedule its obligations under Section 23 was fixed, and it was known that in the performance thereof it would be required to contract for the Owsley County gas and to pay therefor 40 cents per M. c. f. As stated in the brief filed for the city in the court below: "The Mt. Sterling franchise * * * *demands the Owsley County gas, just precisely as does Lexington;* * * *."

The contract with the Petroleum Exploration was entered into on March 24, 1927 (R. 178). This was in compliance with the company's obligation under the franchise contract (R. 36). The day *after* the Petroleum Exploration contract was made, to-wit, on March

25, 1927, the city filed its complaint with the Railroad Commission.

The rates promulgated by the company, averaging 60 cents, were prescribed in anticipation of and based upon the company's obligation under Section 23 to acquire the Owsley County gas, and are equivalent to the temporary rate fixed by the Franchise Contract.

If the rate controversy could have been heard and the evidence presented on the day following the filing of the city's complaint before the Commission, that body would have had before it all of the evidence necessary to enable it to determine what rates would be reasonable based on the Petroleum Exploration contract. In other words, it would then have been able to estimate probable revenues and expenses under the company's rates, making proper allowance for the minimum cost of the Owsley County gas.

Nor was the intercorporate relation which arose as of January 1, 1928, a "condition subsequent." It was merely a subsequent occurrence. If it had been possible for the evidence to be presented to the Railroad Commission and the rates determined at any time during the year 1927, such rates would necessarily have been fixed without reference to the subsequently occurring intercorporate relation.

Finally, and in confirmation of appellant's contention that the controversy has always been understood to be the fixation of just and reasonable rates under the conditions that brought into effect the 60-cent temporary rate, namely, the furnishing of the Owsley

County gas through the second pipe line; and that such rates should be applied from and after the franchise contract date, we call attention to paragraph "Fourth" of the Commission rate order (R. 13) and particularly the following language of the Commission:

> "That it is provided in Section 4(E) * * * that pending the final determination * * * the * * * Company shall * * * charge * * * sixty (60) cents * * * for its gas;"

The Court will note that no reference is made by the Commission to the 50-cent temporary rate which had continued for only a few months. Is it not clear that the Commission understood—just as the parties understood—that the rates to be fixed were to be under the "60-cent" conditions, and should be applied to the franchise contract date and be effective for the prescribed period after that date? This was precisely what the Commission did. It is what the Statutory Court attempted to do, but did incorrectly, and then refused to correct its mistake.

It would unduly prolong this discussion and serve no useful purpose for us to follow through the long arguments contained in the city's brief and reply thereto point by point. The brief is replete with statements for which there is no foundation whatever in the record or in fact. Numerous excursions far afield are taken and pages of discussion which lead nowhere. By the assumption of unwarranted premises and even assuming the point in issue, the discussion of general

principles without relation to the facts of this case, and repetition, counsel evidently seek to persuade the court to their point of view, perhaps on the basis of their remark at the bottom of page 106 that "A thought, an idea, however dogmatic, repeated and repeated, finally tends to become accepted as true." However, in limiting the scope of this reply appellant does not accept, as either relevant or accurate, statements of fact and conclusions in the city's brief not commented on herein.

THIS CASE SHOULD BE FINALLY DISPOSED OF

In conclusion appellant earnestly insists there can be no doubt about its right to reasonable rates under the law and the franchise contract, and that it would be the grossest injustice not to allow for the cost of the Owsley County gas in fixing reasonable rates. Appellant's estimate of return under its schedule of rates is conservative, is absolutely unchallenged by contrary proof, and conclusively shows that the promulgated rates will yield a return of only 5.42% on the low rate base fixed by the Statutory Court. An examination of the record covering operating expenses will lead to the conclusion, to adopt the language of this court in *Ohio Utilities Co.* v. *Public Utilities Com.*, 267 U. S. 359, 363, that there is no evidence which "casts doubt upon their fairness as a measure of the necessary annual operating expenses."

The observation in the opinion in *Lincoln Gas Company* v. *Lincoln*, 250 U. S. 256, 262, that this "litiga-

tion has been extremely tedious and burdensome to both sides and it ought now to be brought to a conclusion on the record as it stands," is sharply applicable to this case. As all facts necessary to a proper disposition of the case are before this Court we urge that rather than prolong the litigation by remand for further findings it now decree the company's promulgated rates to be reasonable (even lower than justified) and end this rate proceeding.

Respectfully submitted,

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CHESTER J. GERKIN,
Counsel for Appellant.

Lexington, Kentucky,
May 6, 1933.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY,
APPELLANT,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL.,
APPELLEES.

OBJECTIONS OF APPELLANT TO MOTION TO QUASH CITATION AND DISMISS APPEAL, WITH COUNTER AFFIDAVIT AND BRIEF

The appellant, Central Kentucky Natural Gas Company, objects to the motion filed herein by Highnight, et al., to quash the citation and dismiss the appeal, on the following grounds:

1. That upon appeal from a district court to the Supreme Court the statute directs the signing of citation by the "district court, or by a justice of the Supreme Court."

2. Movents had no separate standing which would have entitled them to appeal from the decree of the lower court.

3. The petition for appeal and the order allowing same were all inclusive as to parties.

4. The jurisdiction of this Court is not affected by the fact that a citation is not issued during the period allowed for appeal.

ARGUMENT

I.

1. That upon appeal from a district court to the Supreme Court the statute directs the signing of citation by the "district court, or by a justice of the Supreme Court."

Section 999, U. S. Revised Statutes (28 U. S. C. A., §868) provides that:

> "When a writ of error is issued by the Supreme Court to * * * a district court, the citation shall be signed by a judge of such * * * district court, or by a justice of the Supreme Court, * * *."

NOTE: Appeal substituted for writ of error, 28 U. S. C. A., §-861*a*.

This statutory provision disposes of the motion to quash the citation on the ground that it issued out of the district court.

II.

2. Movents had no separate standing which would have entitled them to appeal from the decree of the lower court.

Even assuming that these movents were actually intervening defendants they had no separate standing entitling them to appeal from the decree. *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577.

Appellant also relies upon the authorities cited in its printed objections and brief to the motion to dismiss appeal filed herein on May 8, 1933.

In re Englehard & Sons Co., 231 U. S. 646, 647-651.
Smith v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 592.
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219, 220.

City of New York v. *New York Telephone Co.*, 261 U. S. 312, 315.

III.

3. The petition for appeal and the order allowing same were all inclusive as to parties

Both the petition for appeal (R. 102) and the order allowing the appeal (R. 108) were in the broadest possible terms and necessarily included all parties in interest. Neither the petition nor the order was limited to particular defendants. The Court in directing the issuance of the citation so construed said petition and order.

IV.

4. The jurisdiction of this Court is not affected by the fact that a citation is not issued during the period allowed for appeal

Citation may issue after the expiration of the period allowed for appeal, and the citation here in question was properly issued by the trial court. The issuance of a citation is a ministerial act and not a judicial function.

In *Mendenhall* v. *Hall*, 134 U. S. 559, 567-568, the court said:

> "Our jurisdiction did not depend upon a citation being issued *Evans* v. *State Bank, ante*, 330, although we could not properly proceed to hear the case until Charles F. Hall, as to whom the suit was dismissed in 1885, or his representative, was brought into court by citation."

In *Osage Oil & Refining Co.* v. *Mulber Oil Co.*, 38 F. (2d.) 396, 398, the Circuit Court of Appeals for the Tenth Circuit, said:

> "When jurisdiction of this Court has attached, another rule comes into play. The leading case on the

subject is *Lockman* v. *Lang* (8 C. C. A.) 132 F. 1, 4. Therein Judge Sanborn lays down the rule as follows:

'A citation to appear at the hearing in the appellate court is not jurisdictional in its nature. Its only purpose is to give notice to the appellees that the appeal will be prosecuted, so that they may appear and have a hearing if they desire. It is a part of the procedure prescribed not to give jurisdiction to the appellate court, but to secure to the appellees a fair opportunity to present to that court their arguments in support of the decision below. If, through accident or mistake, the citation has been omitted, and no notice has been given to the appellees of the hearing, the appellate court has ample power to direct its issue and to continue the case until reasonable notice of the hearing has been given. But it may not dismiss an appeal, which is a matter of right, and which is duly allowed by the trial court by the mere acceptance of security for its prosecution (*Simpson* v. *First National Bank* (C. C. A.) 129 F. 257, 260), until an opportunity to give the requisite notice has been furnished, whether the application for the citation is made before or after the statutory time for the appeal has elapsed (*Dodge* v. *Knowles,* 114 U. S. 436, 438, 5 S. Ct. 1108, 29 L. Ed. 144 (296); *Hewitt* v. *Filbert,* 116 U. S. 142, 144, 6 S. Ct. 319, 29 L. Ed. 581; *Mattingly* v. *Railroad Co.,* 158 U. S. 53, 56, 15 S. Ct. 725, 39 L. Ed 894; *Evans* v. *State Bank,* 134 U. S. 330, 331, 10 S. Ct. 493, 33 L. Ed. 917; *Altenberg* v. *Grant,* 28 C. C. A. 244, 246, 83 F. 980, 982; *Railroad Equipment Co.* v. *Southern Ry. Co.,* 34 C. C. A. 519, 522, 92 F. 541, 544).

There is a limitation of time within which such alias citation may issue, but it is not the statutory time for appeal; the time limit is 'before the end of the next ensuing term of this court.' *Jacobs* v. *George,* 150 U. S. 415, 14 S. Ct. 159, 160, 37 L. Ed. 1127. The present rules of this court and the Supreme Court require that the citation must be served 'before the return day' (S. C. Rule 10, 10th C. C. A. Rule 13); the Supreme Court rule in effect, when the case of *Jacobs* v. *George*

was decided, provided that citation must be served before the first day of the ensuing term (S. C. Rules of 1884, 8). Notwithstanding, the Supreme Court and the Court of Appeals for the Eighth Circuit held that others could be joined as appellees within the next ensuing term of the court. This circuit has also so held. *Werner, Harris & Buck* v. *Equitable Trust Co.*, 33 F. (2d) 1023.' "

In *Nome & Sinook Co.* v. *Ames Mercantile Co.*, 187 F. 928, 929, the Circuit Court of Appeals for the Ninth Circuit said:

"Not being jurisdictional, if defective, a new citation may be taken out if necessary (*Shute* v. *Keyser*, 149 U. S. 649, 37 L. Ed. 884); and the mere fact that a citation is not issued until after the time limited for taking the appeal has expired does not defeat jurisdiction of the appellate court."

In *Mattingly* v. *The North Western Virginia Railroad Company*, 158 U. S. 53, 56. In this case the Court speaking through Chief Justice Fuller said:

"It is true that the citation was not signed until April 14, 1891, and not served until the 17th of the month, but neither the signing nor the service of the citation was jurisdictional, its only office being to give notice to the appellee."

In *Jacobs* v. *George*, 150 U. S. 414, the Court entered the following opinion:

"The Chief Justice: Judgment in this case was rendered by the Supreme Court of the territory of Arizona, January 19, 1889, that the judgment of the court below under review by that court be reversed and the complaint dismissed with costs.

January 13, 1890, being one of the days of the next regular term of the court, an appeal was prayed to this court, the appeal was allowed January 14, 1890, the required bond was approved and filed, and the record

was filed here, March 14, 1890, at October term, 1889. No citation was issued and served, nor has any appearance for appellee been entered, nor is any waiver of citation shown.

It must be regarded as settled that: (1) Where an appeal is allowed in open court, and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary; (2) Where the appeal is allowed at the term of the decree or judgment but not perfected until after the term, a citation is necessary to bring in the parties, *but if the appeal be docketed here at our next ensuing term, or the record reaches the clerk's hands seasonably for that term, and legal excuse exists for lack of docketing, a citation may be issued by leave of this court, although the time for taking the appeal has elapsed;* (3) Where the appeal is allowed at a term subsequently to that of the decree or judgment, a citation is necessary, but may be issued properly returnable, even after the expiration of the time for taking the appeal, if the allowance of the appeal were before; (4) But a citation is one of the necessary elements of an appeal taken after the term, and if it is not issued and served before the end of the next ensuing term of this court, and not waived, the appeal becomes inoperative. *Hewitt* v. *Filbert,* 116 U. S. 142 (29:581); *Richardson* v. *Green,* 130 U. S. 104 (32:872); *Evans* v. *State Nat. Bank of Orleans,* 134 U. S. 330 (33:917); *Green* v. *Elbert,* 137 U. S. 615 (34:792)."

In *Pooler* v. *Hyne,* 202 F. 194, 195, the Circuit Court for the Seventh Circuit said:

"The motions for dismissal of the appeal for want of jurisdiction are overruled. The decree appealed from in each case was entered December 21, 1911, and the trial court allowed the appeal and issued the citation June 18, 1912—after the term during which the decree was entered, but within 6 months from such entry. Although service of the citations upon the appellants was not obtained until June 24, 1912, the juris-

diction of this court is unaffected by the fact of such service after the expiration of the 6 months, *Dayton* v. *Lash,* 94 U. S. 112, 24 L. Ed. 33; *Jacobs* v. *George,* 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 112. The various authorities cited in support of the motion—in reference either to writs of error or to appeals in other jurisdictions—are inapplicable to these appeals in equity under the federal practice, wherein jurisdiction of the cause is acquired upon allowance of the appeal. Citation of the appellees is needful only for the purpose of docketing the appeal for hearing when allowed without their presence, either actual or constructive. If allowed during the term, all parties are constructively present, and citation is not required; but allowance after the term entitled the appellees, in their absence, to service of citation before the appeal is docketed for hearing. So, the motion to dismiss for want of such service is without force. See In re *T. E. Hill Co.,* 148 Fed. 832, 78 C. C. A. 522."

In *Railroad Equipment Co.* v. *Southern Railway Co.,* 92 F. 541, 544, Sixth Circuit, Judge Taft, after quoting from the opinion in *Jacobs* v. *George,* 150 U. S. 415, *supra,* observed:

"The next ensuing term of this court, after the allowance of the appeal in this case, was the present term, that of October, 1898, which will not end until October, 1899. There is still time in which to issue a citation and bring in the East Tennessee, Virginia & Georgia Railway Company before the end of this term. *Altenberg* v. *Grant,* 54 U. S. App. 312, 28 C. C. A. 244, and 83 Fed. 980."

In *Martin* v. *Burford,* 176 F. 554, 555 (Ninth Circuit), the Court discussed the matter of amendment under Section 1005 Revised Statute as distinguished from the issuance of a citation, as follows:

"But this rule of amendment does not apply to the citation, which is a notice to the adverse party or parties to appear in the appellate court and show cause

why a judgment should not be corrected. In such case all parties in whose favor the judgment is rendered must have notice. The notice may be waived; but if not waived, and the defendants in error are not served with notice, either personally or by their attorney, they have not been brought within the jurisdiction of the court. *The proper practice in such case is to issue a new citation. Knickerbocker Life Ins. Co.* v. *Pendleton, supra; Jacobs* v. *George,* 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Atlenberg* v. *Grant,* 83 Fed. 980, 28 C. C. A. 244.

Let a new citation issue in this case, to be served upon the attorneys of record representing the defendants in error in the court below, *or the attorneys who have appeared specially in this court, or upon all the parties in whose favor the judgment was entered.*"

In *Berliner Gramophone Co.* v. *Seaman,* 108 F. 714, 717, the Circuit Court of Appeals for the Fourth Circuit, after reviewing the authorities, said:

> "It appearing in this case that a citation has been issued before the term ensuing next after the entry of the order appealed from, the court has jurisdiction, notwithstanding that the citation was issued more than 30 days after the date of the order. The motion to strike the case from the docket is refused."

See also, *Noonan* v. *Chester Park Athletic Club Co.,* 93 F. 576 (Sixth Circuit); *Weinstein* v. *Black Diamond B. S. Corporation,* 31 F. (2d), 519 (Second Circuit). *Rector* v. *Alcorn,* 204 F. 748 (Fifth Circuit).

Reply to Movents' Brief.

1. This Court did not hold by its order of May 9, 1933, that the movents were necessary parties. Appellant contends that while said movents may be proper parties, they are not necessary parties. If considered actual parties to this suit in the court below, movents were not independent parties. They became intervenors subject to the

right of the City of Lexington and S. B. Featherston for himself and other consumers to direct the litigation. The petition for permission to intervene asked for leave to intervene for the purpose of aiding the City and Featherston as the principal defendants.

2. No award has been made by the Railroad Commission to any gas consumer. The Commission's order merely fixed the rate for gas service. An award under the statute (Section 201e—17, Kentucky Statutes) consists of a specific allowance to an applicant against the utility for a specified sum previously collected as an excessive charge. No such proceeding has ever been instituted before the Railroad Commission against appellant, nor has any order of that character been entered.

3. Counsel for movents cite a number of cases involving appeals by a defendant where a joint judgment was rendered against such defendant and others. In such cases all of the joint defendants are necessary parties appellant in the absence of summons and severance. These cases have no application to the question here raised.

4. While this Court could properly issue a citation as against said movents, this could also be done by the court below.

5. The statement attributed to Judge Hickenlooper on page seven of the printed motion and brief is incorrect. The order of the Statutory Court entered May 17, 1933, directing the issuance of the citation was concurred in and signed by all three members.

6. Subsequent to the issuance of the citation to movents by the court below, notice was served on their attorney and copy of the assignment of errors and the portions of the record filed herein and considered by appellant as essential to the appeal furnished him, which notice after ac-

ceptance was filed with the Clerk of this Court on July 14, 1933, and copy of which is printed as an Appendix hereto.

Said movents have made no effort to add to the record. Appellant does not consider that the burden is upon it to bring into this record any additional portions unless specified in praecipe filed by the movents as essential to the appeal.

7. The franchise contract is between the company and the city, the latter representing all consumers having any interest thereunder. The city is not a nominal but an actual and real party in interest, as well as a representative party.

In an appeal from a judgment denying the injunction against the Commission which ordered the rate, the individuals affected by the rate order were not necessary parties to the appeal even though they were permitted to intervene. This is so because the injunction was not and could not be granted against said individuals.

While the court below has by its order directed the distribution of a portion of the impounded fund to the consumers generally, said order did not determine the right of any particular consumer in said fund, and therefore individual consumers are not necessary parties to this appeal. The City of Lexington, with which the Franchise contract was made, and S. B. Featherston representing all other consumers were the only necessary parties as the rights of all consumers in said impounded fund are identical and may be fully heard and determined by this court without the presence as a nominal party here of any individual consumer.

Respectfully submitted,

HENRY T. DUNCAN,
DYKE L. HAZELRIGG,
CHESTER J. GERKIN,
Attorneys for Appellant.

October 9, 1933.

COUNTER AFFIDAVIT ON BEHALF OF APPELLANT IN RE MOTION AND AFFIDAVIT OF HIGHNIGHT, ET AL.

The affiant, T. J. Tonkin, Jr., states that he is a resident of the City of Lexington, and is Vice President of the Central Kentucky Natural Gas Company and as such has general executive charge and management of the business of said company.

Affiant says:

1. That Mrs. Wellington Payne died on July 21, 1932, and was not a gas consumer after April 7, 1927 nor has her estate any interest in the impounded fund in this case.

2. That H. E. Stevens died on June 5, 1933.

3. That Mrs. George Highnight did not become a gas consumer until March 12, 1931, and ceased to be such on September 4, 1931. At the time of the filing of the intervening petition in the court below on behalf of Mrs. George Highnight she was not a gas consumer.

4. That Anna Mae Hollinger has not been a gas consumer since August 1, 1927, and has no interest in the fund impounded during the pendency of this cause, and she was not a gas consumer at the time the petition on her behalf to intervene was filed in the court below.

5. That Mrs. Gladys Berkley has not been a gas consumer since March 8, 1928, and was not at the time of the filing of the intervening petition in the court below to make her a party defendant, and she has no interest in the fund impounded during the pendency of this cause.

6. That Mrs. Margaret Taylor has not been a gas consumer since June 24, 1929; and was not at the time of the filing of the petition on her behalf in the court below to make her a party defendant, and she has no interest in the fund impounded during the pendency of this cause.

7. That J. W. Delph has not been a gas consumer since September 14, 1931, and was not at the time the motion was made herein on his behalf.

8. That the share or interest to date of the following movents in the fund impounded during the pendency of this cause under the rate found by the court to be reasonable is as follows:

R. T. Childers	$33.50
J. W. Delph	6.30
S. W. Dearborn	15.30
William Dearborn	18.30
P. P. O'Neill	22.60

9. That the former franchise of Central Kentucky Natural Gas Company in the City of Lexington expired on September 5, 1925; that thereafter J. A. Edge, appearing of counsel herein for certain movents, made diligent and persistent effort to create the impression that corrupt relations existed between the officials of the City of Lexington and its attorneys and the company and its attorneys, and that there was danger of a franchise being granted on terms that would not properly protect the interests of the gas consumers. At the request of the Directors of the Board of Commerce of Lexington, Kentucky, representing the various business and commercial organizations of said city, the officials of the City of Lexington in December 1926 employed the Honorable Robert H. Winn, Attorney at Law of Mt. Sterling, Kentucky, and a former member of the Court of Appeals of Kentucky, as special counsel to represent the

city and the gas consumers in all negotiations and proceedings in connection with the granting of a franchise and the fixation of rates thereunder; that said attorney occupies the highest standing as a member of the bar in the State of Kentucky, and that subsequent to the employment of Judge Winn the gas consumers of Lexington have been entirely satisfied with his handling of all matters concerning the rate controversy.

That the said J. A. Edge has been active in local politics in the City of Lexington during the pendency of the negotiations for a new gas franchise and controversy over the rate to be charged for gas service, and has constantly used the charge of collusion between the city and company for political purposes.

Further responding to the affidavit of movents affiant says:

(*a*) Referring to paragraph 3, that the so-called Gas Consumers' League is not a legal entity, was not a party to and did not participate as such in all or any of the proceedings in this case.

(*b*) Referring to paragraph 4, there has never existed at any time any "interlocking conditions" or inter-corporate affiliations of any kind between the appellant and any power or utility company in Lexington; or with the governmental, political or financial organizations in said city.

(*c*) Referring to paragraph 5, no negotiations between the company and the officials of the city were ever held behind closed or locked doors, nor was the public or newspaper men excluded therefrom; that on the contrary all negotiations were open and public and fully reported in the Lexington newspapers.

(*d*) Referring to paragraph 10, the city never prepared or enacted a franchise contemplating any rate in excess of

60 cents, or providing for a pressure below the usual point of usefulness in cold weather.

(*e*) Referring to paragraph 24, said Railroad Commission never made any award to any complainant in said proceeding, but merely fixed a rate.

Witness the hand of this affiant, T. J. Tonkin, Jr., this 4th day of October, 1933.

(Sgd.) T. J. TONKIN, JR.

Subscribed and sworn to before me, a Notary Public, whose commission expires on the 4th day of April, 1934, this 4th day of October, 1933.

[SEAL.] (Sgd.) H. T. DUNCAN, JR.,
Notary Public, Fayette County, Ky.

APPENDIX

IN THE

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

In Equity, No. 578

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Plaintiff,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL.,
Defendants.

Notice

To:

Mrs. George Highnight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson and H. E. Stevens, individually and as representing any and all other gas consumers of the City of Lexington associated with them, including all gas consumers who may be associated with them under the name of Gas Consumers League of Lexington, Kentucky, or otherwise, and J. A. Edge, Attorney for said parties:

1. That on December 20, 1932, the plaintiff, Central Kentucky Natural Gas Company, filed with the Judges of the Statutory Court sitting in the above styled action its Petition for Appeal, and Assignment of Errors; that on the same day the Judges of said court entered an order allowing said appeal; that on the same day a supersedeas bond was duly executed and approved by said Judges.

2. That on December 20, 1932, the said Central Kentucky Natural Gas Company, appellant, filed in the office of the clerk of said Statutory Court its Statement of Jurisdiction.

3. Pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, you are hereby served with copies of the aforesaid Petition for Appeal, Order

Allowing Appeal, Order Approving Supersedeas Bond, Assignments of Error, and Statement as to Jurisdiction in the above entitled cause. Your attention is directed to the provisions of Rule 12, paragraph 3, of the aforesaid Rules of the Supreme Court of the United States, which said paragraph reads as follows:

> "3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a motion is made, it may be opposed as provided in Rule 7, paragraph 3."

4. That on the 16th day of January, 1933, the above named plaintiff filed in the office of the clerk of the Court in the above styled action, its Præcipe for a transcript of the record to be filed in the Supreme Court of the United States pursuant to the appeal allowed in the above-entitled cause entered by said court on December 20, 1932. A copy of said Præcipe is filed herewith attached hereto marked "Exhibit A".

5. That on the 16th day of January, 1933, the said plaintiff lodged with the clerk of said court a "Condensed Statement of the Pleadings Before the Railroad Commission of Kentucky and Evidence Essential to Decision of Questions Presented on Appeal," a copy of which is attached hereto marked "Exhibit B".

6. That on the 31st day of January, 1933, there was lodged with the clerk of said court for and on behalf of the City of Lexington and certain other defendants, appellees, their Amendments to the plaintiff's Statement of Evidence, a copy of which is attached hereto marked "Exhibit C"; that as modified by the Judges of said court the said Statement of Evidence lodged on behalf of the plaintiff, Central Kentucky Natural Gas Company, as aforesaid, and the said Amendments thereto lodged by the defendants aforesaid

was duly approved by the Judges of said court and certified by them to be true, complete and properly prepared, and the same were thereafter filed with the clerk of said court on March 9, 1933.

7. That the clerk of said court thereafter made and certified a transcript of the record in said cause as required by said Præcipe and including the aforesaid Statement of Evidence and Amendments thereto, as approved by the Judges of said Court, and said transcript was duly filed with the clerk of the Supreme Court of the United States on the 15th day of March, 1933.

8. That on March 18, 1933, the appellant, Central Kentucky Natural Gas Company, filed with the clerk of said United States Supreme Court its "Statement of Points to be Relied upon and Designation of Parts of Record to be Printed", the same being fully set forth in the printed copy of the "Transcript of the Record" prepared by the clerk of the United States Supreme Court, a copy of which is hereto attached marked "Exhibit D".

9. That on March 27, 1933, the attorneys for the City of Lexington and others, appellees, filed with the clerk of the Supreme Court of the United States their designation of additional portions of the record and statement of the evidence which they desired to have printed. The same appears in said printed record above referred to, a copy of which is attached hereto marked "Exhibit D".

10. That on March 27, 1933, there was also filed with the clerk of the Supreme Court of the United States a Stipulation designating additional portions of said record to be printed as appears in the aforesaid printed record marked "Exhibit D".

11. That on March 31, 1933, there was also filed with the clerk of the Supreme Court of the United States a further Stipulation designating additional portions of said record to be printed as appears in the aforesaid printed record designated as "Exhibit D".

12. Your attention is called to the aforesaid printed copy of the "Transcript of Record" attached hereto marked

"Exhibit D" which sets forth fully and completely the record and Statement of Evidence and amendments thereto which were certified by the clerk of said statutory court sitting herein and caused to be printed by the Central Kentucky Natural Gas Company, appellant, and by the City of Lexington and others, appellees, and upon which this cause is sought to be heard and submitted before the United States Supreme Court.

13. You are further notified that on April 20, 1933, the appellant, Central Kentucky Natural Gas Company, filed its printed brief with the clerk of the United States Supreme Court; and you are further notified that on May 6, 1933, the said appellant, Central Kentucky Natural Gas Company, filed with the clerk of said Court its Reply Brief. Copies of said two briefs are attached hereto marked respectively "Exhibit E" and "Exhibit F".

14. You are further notified that the appellant is ready and willing to co-operate with you in having filed with the clerk of the Supreme Court of the United States at the earliest practicable date, and to have the same printed, pursuant to stipulation or other appropriate method, such additional portion or portions of the record and evidence as you may consider essential to the appeal (subject however, to the right of appellant to object to any portion or portions of the record or evidence designated by you as not being in fact essential to the appeal),—to the end that there may be no delay in the proper certification and printing of such additional portions of the record and evidence, and in order that there may be no delay in the hearing and submission of this cause in the United States Supreme Court.

HENRY T. DUNCAN,
D. L. HAZELRIGG,
CHESTER J. GERKIN,
Attorneys for Central Kentucky Natural Gas Company, Appellant.

Dated, Lexington, Kentucky, July 11, 1933.

Service is hereby accepted of the foregoing notice, together with copies of the papers and exhibits therein referred to.

This 11th day of July, 1933.

J. A. EDGE,
Attorney for Mrs. George Highnight and others.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY,
APPELLANT,

v.

RAILROAD COMMISSION OF KENTUCKY ET AL.,
APPELLEES.

SUMMARY AND REPLY BRIEF FOR APPELLANT

We believe the Court will be aided by a summary statement of the facts, points and argument for appellant. A reply to the additional brief recently filed by the City, and to the brief just filed on behalf of Mrs. Hignight and others, additional appellees, may also be helpful.

Introduction

We designate herein:

The appellant, Central Kentucky Natural Gas Company, as "Company."

The Railroad Commission of Kentucky as "Commission."

The City of Lexington as "City."

Mrs. Hignight and others as "additional appellees."

United Fuel Gas Company as "United Fuel."

The additional supply of gas required by the Franchise Contract to be furnished through a second pipe line and contracted for with Petroleum Exploration, a West Virginia Corporation, as "the Owsley County gas."

Statement of Facts

The Company is a Kentucky Corporation organized in 1905.

The City is a municipal corporation of Kentucky.

The Company acquired twenty year franchise contracts to furnish natural gas in the City, and also in the Cities of Winchester and Mt. Sterling, to the east of Lexington, in 1905, and began to furnish gas from its Menifee field in 1906. These franchises expired in September, 1925. Prolonged negotiations ensued with the City over the terms of a new franchise. The main points of controversy related to the service and the rates. The Company had not been able to deliver through its ten inch transmission line gas in sufficient quantities to meet peak demands. The City was demanding an additional supply from a new field through a second line.

The Petroleum Exploration had developed a considerable gas field in Owsley County, Kentucky, about sixty miles from Lexington. An offer by it to deliver gas from this field to the Company at Lexington at 40 cents per M. c. f. was made, and this fact was communicated to the City. The Company proposed to the City that it would contract for an adequate supply of this gas if assured of a compensatory rate for the additional expense incurred and service furnished.

The terms of a franchise ordinance were finally agreed upon, and on January 28, 1927 the present franchise ordinance was passed. On February 25, 1927 a contract was entered into between the Company and the City under the

terms of this ordinance. The franchise contract required the Company to furnish the Owsley County gas through a second line within a limited time.

Since no agreement could be reached on the rates for the required service, the franchise contract merely provided for reasonable rates; that the Company should immediately promulgate the rates proposed to be charged; and for the determination by the Commission or Court to which the controversy might be taken of the reasonableness of such promulgated rates.

Pending the fixing of rates by the Commission or Court the franchise contract provided for a rate of 60 cents for the service contracted for, 10 cents thereof to be impounded and the impounded fund distributed according to the rates finally fixed by the Commission or Court.

Immediately following the making of the franchise contract the Company entered into formal contract with Petroleum Exploration under which it agreed to purchase, and the Petroleum Exploration agreed to deliver at Lexington, a minimum annual quantity of 750,000,000 cubic feet of gas at 40 cents per M. c. f. This contract does not expire until February 20, 1947. It covers the same period as the Franchise Contract.

The Company promulgated a schedule of rates which it proposed to charge, averaging 60 cents per M. c. f.; and the City filed its complaint with the Commission attacking these rates.

The Company began furnishing the Owsley County gas the latter part of November, 1927, and the agreed temporary rate of 60 cents went into effect on December 1, 1927.

By reason of the time necessary to enable Ford, Bacon & Davis, Inc., to make an inventory and determine the reproduction cost new less deterioration of the Company's prop-

erty, to investigate the operating records of the Company, and to prepare the necessary exhibits, it was not until March, 1928, that the Company introduced its evidence. The testimony for the Company was then transcribed in order to give the City and its witnesses an opportunity to examine same and prepare inventories and make valuations, and to prepare for the cross-examination of the Company's witnesses. In December, 1928, the witnesses for the Company were cross-examined; and in April, 1929 the City introduced its witnesses and evidence. The testimony for the City was then transcribed and in June, 1929 the witnesses for the City were cross-examined, rebuttal evidence offered by the Company, and hearings concluded.

On October 9, 1929 the Commission entered its order fixing a 45 cent rate for the contracted service. The Commission applied this rate to the contract date, February 25, 1927, and over the intervening period.

Prior to the entry of the rate order the Company requested the Commission to make findings of fact. Objection thereto was made by the City and the Commission refused to make any findings whatever.

The Company filed this suit on October 19, 1929 seeking to enjoin the enforcement of the Commission rate as confiscatory, alleged the reasonableness of its own rates, and asked that the impounded fund be awarded to it.

The parties agreed to submit the case on the Commission record. An order to that effect was entered by the Statutory Court. The issue thus submitted was the validity of the Commission rate for the contracted service as of the date of the order (October 9, 1929) and as applied over the period from and after the ffanchise contract date (February 25, 1927).

The Court below filed its opinion on July 11, 1932 holding the Commission rate was inadequate and confiscatory.

It determined the rate base, rate of return, and allowances for amortization and extraordinary maintenance; and found that the net income produced in 1927 under the 50 cent rate (60 cents in December) was sufficient to provide for operating expenses, allowances for amortization and extraordinary maintenance, and yield the Company, in a normal year, a return of 7 per cent.

The Court overlooked the fact that under the 50 cent temporary rate collected in 1927 (60 cents in December) the cost of the purchased Owsley County gas (amounting to $300,000.00 annually) was not reflected in the operating expenses except that portion purchased in December, 1927 (about 15 per cent of the minimum annual requirement) and therefore the net income for that year was not typical or representative of a normal year.

The Company filed a petition to modify and correct the decision by making proper allowance for the additional cost incurred in rendering the service by allowing for the full cost of the Owsley County gas, and by making certain other adjustments shown by the record to be necessary in determining net income for a normal year—particularly temperature and income tax adjustments.

The Court refused to modify its opinion on the stated ground that the parties had requested it to determine the rate base as of December 31, 1926, and to determine the validity of the Commission rate of 45 cents as applied to that date, and that a determination of income on the basis of the contracted service would necessitate a redetermination of the value of the property as of a date or dates subsequent to December 31, 1926.

The Court found that the Company was entitled to a permanent injunction against the Commission rate, but only if the Company would agree to accept the 50 cent rate considered by it to be reasonable, and gave the Company its

election. The Company declined to acquiesce in the offered 50 cent rate.

On September 22, 1932 decree was entered fixing the rate base, allowance for amortization, rate of return, and holding the Commission rate of 45 cents invalid; but because the Company had declined to acquiesce in a 50 cent rate, the Court refused to grant a permanent injunction against the Commission's order. The decree directed a distribution of the impounded fund on the basis of a 50 cent rate as reasonable, ordered the Company to pay the costs, and further directed the Company to file a statement of the amounts collected from its consumers between the Commission rate of 45 cents and the 50 cent temporary rate during the period of its collection, and also of the amounts collected between 50 cents and the 60 cent temporary rate.

The Company filed a petition for rehearing which was denied.

Errors Relied Upon

The errors relied upon are:

1. The Court's failure to take into consideration the cost of the Owsley County gas in estimating the Company's operating expenses as for a normal year.

2. In determining net income for a normal year the Court should have made the necessary adjustments for average temperatures as affecting the quantity (and cost) of gas purchased and sold; and for the increased income tax.

3. The Court's refusal to determine the validity of the Commission rate as applied to the service contracted for, and over the period to which the Commission applied its rate.

4. The finding that a 50 cent rate for the contracted service would produce a 7 per cent return.

5. The finding that a 7 per cent return is fair.

6. The refusal to find the Company's promulgated rates reasonable.

7. The refusal to find that a flat rate is discriminatory and confiscatory, and that the Company has the contract right as well as the statutory right to fix its own rates both as to form and amount, provided that they be just and reasonable.

8. The refusal of the Court to grant a permanent injunction against the enforcement of the Commission rate which it found to be confiscatory.

9. The refusal of the Court to enter a final order fixing reasonable rates for the service required under the contract and to order a distribution of the impounded fund on that basis.

10. The order directing the Company to pay the costs, contrary to the franchise contract.

Summary of Argument

I.

The Court erred in assuming that the 1927 expenses under the 50 cent temporary rate (60 cents in December) fairly represented the Company's operating expenses in a normal year for the contracted service.

The Company collected the temporary rate of 50 cents provided for in the franchise contract until the additional service contracted for began, that is, until it was furnishing the Owsley County gas through the second line. This service began in November, 1927, and the agreed temporary rate of 60 cents went into effect December 1, 1927.

The Court found that the net income in 1927 under the

50 cent rate (60 cents in December) was almost enough to produce a 7 per cent return on the rate base, and concluded that a 50 cent rate for the contracted service would in a normal year (1927 being warmer than usual) produce a 7 per cent return. In adopting the income for 1927 under the 50 cent rate (60 cents in December) as typical for a normal year the Court overlooked the fact that the 1927 expenses did not reflect the added cost incurred by the Company on account of the purchase of a minimum of 750,000,000 cubic feet of gas at 40 cents, amounting to a fixed annual expense of $300,000, required by the franchise contract.

As delivery of this gas did not begin until November, 1927, no expense for it appeared in the item "Cost of Gas" for 1927 until the month of December. The cost of the Owsley County gas purchased in December, 1927 amounted to $47,485.34 as compared with the fixed annual minimum cost of $300,000 therefor.

The City has always and unequivocally admitted that full allowance must be made for this fixed annual expense, on the ground that the contract under which this gas was purchased was entered into pursuant to the absolute requirement of the franchise contract.

The mistake or oversight of the Court conclusively appears on the face of its opinion. The Court says (R. 89):

> "This result may be reasonably accepted, * * *, as a fair *prophecy* of a minimum return during a normal year by the application of a 50 cent rate."

A prophecy looks to the future and the necessary implication is that the Court was endeavoring to determine a reasonable rate for the contracted service when it found that the 50 cent rate would—

> "* * * permit the deduction of the necessary expenses incurred in ordinary maintenance * * * an

> annual reserve to cover extraordinary maintenance and repairs. * * * the deduction of all taxes, including the Federal income tax. * * * allowances in the meantime of adequate amounts *for necessary expenses* * * *."

Had the Court intended to exclude the cost of the Owsley County gas as a "necessary expense" it would certainly have said so, especially as the City expressly admitted such purchased gas to be a necessary expense. The testimony, exhibits, and briefs of both City and Company allowed for the full annual cost of this gas. The Court did not discuss or even mention the cost of the Owsley County gas. The list of producers furnishing gas is set forth in the 1927 operations, including the Petroleum Exploration contract for the Owsley County gas, and in adopting the expense so manifested the Court necessarily approved of and intended to give full recognition to that contract.

The Court criticized the Company's estimate of return under its proposed rates because the estimate showed a less return under these rates, averaging 60 cents, than the company actually received in 1927 under the 50 cent rate (60 cents in December). The Court said this result was "strange". It did not understand or appreciate that the estimate made proper allowance for the cost of the Owsley County gas which accounted for this result. The Court did not reject the estimate because of such allowance. It would surely have done so had it intended to reject the cost of the Owsley County gas as an operating expense.

As a reason for refusing to correct its mistake the Court said that the parties had requested it to determine the rate base as of December 31, 1926, and to determine the validity of the Commission rate as of that date; and said that a determination of the net income on the basis of the contracted service would necessitate a redetermination of the rate base

as of a later date because that service did not begin until December 1, 1927.

The evidence showed there was no material change in property values between December 31, 1926, and the date of the Commission's order (October 9, 1929). Furthermore, since the contract left open the question of reasonable rates from the contract date, February 25, 1927, it was obviously necessary that the rate base be determined as of that date, as a basis for distributing the fund which began to be impounded on that date. As there was no subsequent material change in the rate base the parties were willing to accept for all purposes of the case the value of the property as of December 31, 1926.

A determination of net income on the basis of the cost of the additional service, and which both parties have at all times agreed must be allowed in operating expenses, had nothing whatever to do with the rate base and service which began on December 1, 1927, and did not necessitate a redetermination of the rate base as of that date because operating expenses do not affect values.

The reason assigned for refusing to modify the opinion is inconsistent with the Court's own action in adopting as the rate base the sale price of the Company's capital stock in January, 1928, which was subsequent to the beginning of the service contracted for.

Finally, the refusal of the Court to determine net income and a reasonable rate on the basis of the added cost for the contracted service was a refusal to decide the very issue created by the franchise contract and submitted for decision. This was the precise question submitted to and decided by the Commission, as clearly appears from the Commission's order. It was the theory of the City whose counsel prepared that order at the request of the Commission. The order was entered on October 9, 1929, and the 45 cent rate was fixed as *a future rate for the con-*

tracted service which the Company had been furnishing since December 1, 1927. The very language of the order in its reference to the 60 cent temporary rate proves conclusively that the Commission intended to fix a rate under the 60 cent conditions, that is, the service contracted for. It was compulsory on the Commission to do this. The Commission applied the rate to the contract date and over the intervening period, without making any distinction between the service which the Company rendered under the old operating conditions for a period of nine months and the service contracted for which commenced December 1, 1927, when the company began furnishing the Owsley County gas through the second line.

The rate order does not even refer to the 50 cent temporary rate which was collected until the additional service began. This omission can be explained only on one of three grounds, either (1) the Commission overlooked the question of fixing a rate for the period of the 50 cent temporary rate, or (2) the Commission regarded the question of a different rate for the 50 cent period as of negligible importance, or (3) the Commission construed the contract as requiring the fixation of a rate for the contracted service as of the date of the rate order and under the 60 cent conditions, and as requiring the application of such rate to the contract date and the intervening period without regard fo the operating conditions existing during the collection of the 50 cent rate.

The last reason furnishes the only rational interpretation of the Commission's understanding of the franchise contract. It was the interpretation placed on the agreement by counsel for the City. It was the interpretation placed on the contract by counsel for the Company, who wrote in its brief filed in the Court below (and filed here by the City) that—

"* * * the rates and charges as finally fixed by the Commission or Court should apply as of the contract date, * * *" (Company's Reply Brief, p. 16).

In determining net income for a normal year the Court should also have made the necessary adjustments based on average temperatures as affecting the quantity and cost of gas purchased and sold, and for the increased income tax. This question is discussed in detail in the Company's main brief at pages 41-46. The principle involved is well illustrated in the recent Los Angeles case (289 U. S. 287).

On the above grounds the Company contends that the reason assigned by the Court for refusing to modify its opinion and determine net income on the basis of operating expenses for the contracted service is unsound.

II.

50 Cent Rate for Gas Will not Produce 7% Return

It is not denied that a 50 cent rate for gas for the contracted service would not produce a 7 per cent return (after making proper allowance for the cost of gas purchased by the Company). The calculations set forth in the Company's main brief demonstrate that a 50 cent rate would produce a return of only 2.6 per cent.

III.

The Company's Rates are Reasonable

For the contracted service the Company's schedule of rates, averaging 60 cents, would produce a return of only 5.42 per cent. The company's estimate of return under this schedule has been worked out with painstaking completeness. No error in method or as to a single detail has been pointed out. The only criticism offered by the City is

that it is merely an estimate. The city presented no estimate.

The franchise contract gives the Company the right to fix its own rate structure. Such schedule may include a minimum or service charge, higher rates for smaller quantities of gas and lower rates for larger quantities. This contract right is also a statutory right. The Company should not be required to operate under a flat rate, which form of rate necessarily results in discrimination among consumers.

IV.

The Fair Return

The matter of a proper rate of return is a question of fact, depending on the evidence, and can not be determined as a matter of judicial knowledge. The evidence for the Company was that a 10 per cent rate of return was fair. The City offered no evidence on the subject. The decree fixing a 7 per cent return is contrary to the only evidence in the record.

V.

Permanent Injunction Should Have Been Granted

Although finding the Commission rate of 45 cents confiscatory the Court refused to grant an injunction restraining its enforcement unless the Company accepted a 50 cent rate. The Court attempted to justify its action under the equitable doctrine requiring a plaintiff asking equity to do equity. This doctrine has no application. Having sustained the burden of proving the Commission rate confiscatory the Company was entitled to the permanent injunction as a matter of right.

The condition imposed required the Company to surrender its lawful right of appeal and was therefore wrong as a matter of law and an abuse of judicial discretion, even

if the Court had the right to exercise any discretion in the matter. The franchise contract carefully fixed and protected the mutual equities of the parties. There was no reason therefore for employing the equitable doctrine, and its application deprived the Company of its contract rights. The Court should have granted the injunction and entered a final order either sustaining the Company's promulgated rates or fixing just and reasonable rates for the contracted service.

Aside from the franchise contract (which both parties agree makes the question of reasonable rates a judicial one), this subject matter is a judicial question by virtue of the impounded fund which must be distributed on the basis of reasonable rates or compensation for the service rendered.

The determination of just and reasonable rates by this Court or a judgment sustaining the Company's rates would not be a legislative act fixing a future rate. It would be the fixing of rates as of the date of the Commission order and for a past service. The application of the rates fixed to the ensuing two year period is the result of the franchise contract.

VI.

It Was Error to Order the Company to Pay the Costs

The franchise contract provides that all Court costs shall be paid equally by the Company and the City. It was therefore error for the Court to order the Company to pay all costs. The City concedes this error.

VII.

Response to City's Brief

Our refusal to follow through the various contentions and erroneous calculations contained in the City's main brief seems to be regarded by counsel as a confession of

weakness, and our criticism of the City's brief as containing incorrect statements is rather warmly protested (City Reply Brief, p. 37). Continued declination on our part to point out some of the errors of counsel in the use of figures and in statements of fact might be misconstrued, and we shall attempt to justify our previous observations.

Treatment of the 1926 Operations

We go first to the City's reply brief. Counsel express amazement at having overlooked a matter now found to be so conclusive as to really end the argument. This new point is given front-row position in the first four pages.

(*a*) They arrive at the "actual" result of 1926 operations, as if under a 45 cent rate, by adding the amounts of gas sold under the 40 cent and 50 cent rates and dividing the total by two. This amount is then added to the net income under the 40 cent rate (R. 116*a*, last figure in next to the last column) after deducting the Court's allowances for amortization and extraordinary maintenance, and the result ($196,262) is presented as the "actual" income for 1926 under a 45 cent rate.

No allowance is made for the added cost of gas under a 45 cent rate, and the larger income tax under such rate. They should have taken the totals of income under the 40 cent rate and the 50 cent rate (the last figures in the last two columns of page 116*a*) to-wit, $196,232, and $278,254, or $474,486, and divided this figure by two, making $237,243. This would be the correct revenue under a 45 cent rate for amortization, etc., based on 1926 operations. Deducting the total of the Court's allowance, $75,263, would give as net income for return $161,980 instead of the City's figure of $186,262. This income would produce a return of approximately 7.3 per cent on the Court's rate base and not a return of 8½ per cent as stated by the City. How-

ever, the exclusive use of 1926 operations is basically wrong as shown herein.

(*b*) The year 1926 is declared to be "the agreed year," and counsel treat this point as if the Court below had expressly based its findings of income and reasonable rate on the actual operations for 1926.

Counsel do not indicate who were the parties to the assumed arrangement under which 1926 became "the agreed year," or point to any record evidence of the existence of any such agreement. The Court certainly did not so understand the matter as it discussed the 1926 operations, both under the 40 cent rate and under the 50 cent rate, and rejected the actual operations for 1926 as not affording a fair test, because the temperatures were much lower than the average (R. 88-89). No Court or Commission could or would even think of fixing a future rate on the basis of one year's operations.

(*c*) It is stated that the Court found "a net income available for return in 1926 of $144,574." This was the actual net income which the Court found for 1927 under the temporary rate of 50 cents (60 cents in December). Perhaps the use of "1926" is a misprint in counsel's brief, but under that view the use of the figures in connection with 1926 operations would be without point.

(*d*) Although having no bearing on the point attempted to be made, counsel compare (p. 3) the property valuation claimed by the appellant in its Bill of Complaint, to-wit, $6,340,895, with the Court's rate base of $2,198,107. The comparison is made as though the two amounts were properly comparable, and for the obvious purpose of impressing this Court with the idea that appellant had made excessive valuation claims. The figures are not comparable. The $2,198,107 includes only the allocated portion of appellant's property, plus the value assigned to the Lexing-

ton Utilities property. The value of appellant's property fixed by the Court was $2,880,000, and for the Lexington Utilities property $611,227, a total of $3,491,227. A valuation of $2,000,000 was placed by the Company's witnesses on the Menifee field for storage use and as a gas holder for emergency purposes. The Court rejected this claim (R. 83). Omitting this single item the value given to the two properties by the Court below is not greatly less than claimed by the Company. Had the Court in adopting the sale price as the best evidence of value added the Company's indebtedness over its deductible assets, amounting to more than $400,000, as manifested by the balance sheet (R. 215), the total value would have been $3,891,227, as against the Ford, Bacon & Davis, Inc., valuation of $4,280,627 (Company Brief in District Court, pp. 19-22).

It is difficult to attribute counsel's misuse of the above figures entirely to unconscious error.

The record shows conclusively that it is impossible for the Company to earn an adequate return on the Court valuation under its schedule of rates averaging 60 cents. For the Company to contend for a higher rate base would have no compensating advantage, even if successful.

The Amortization Allowance

Still denying the right of the City to attack the allowances for amortization and extraordinary maintenance (it not having appealed), we will reply to its contentions relative to this subject matter. The City put into the record certain testimony offered by it claimed to have a bearing on the annual allowance which the Company is entitled to for amortization. It presented no estimate or proof of what the allowance therefor should be. It claims the right to attack the Court's findings of fact under the doctrine of the *Langnes* case (282 U. S.

531) and comfortably reflects that if the Company had any evidence on the subject and did not bring it here, this is the fault and misfortune of the Company. This Court was asked to consider the amortization allowance without having before it any of the evidence on the basis of which the allowance was made. The Court below gave no weight whatever to the Beckner estimate of reserves, nor to the fact that appellant is now a subsidiary of Columbia Gas & Electric Corporation.

Counsel for the City state with specific definiteness that there was no evidence justifying any allowances whatever for amortization. They comment thus on the Court's findings (Reply Brief, p. 20):

> "It allowed it without even speculation behind the allowance. It just allowed it.
>
> * * * * * * *
>
> *And it (the appellant) introduced no word, no expert, no hint, to justify the allowance. Literally, absolutely, exactly, it introduced not one word* of proof about gas supplies. * * * *it may be that it dared not submit the facts.*"

Apparently conceiving a weakness in the City's contention on amortization without having the Company's evidence on the subject before this Court, counsel for the additional appellees have caused to be certified the testimony of the Company's expert witness, Mr. Kimball (Addition to Transcript, pp. 10-14, 19, 22-35, 37-45).

The addition to the printed record shows that the amount claimed by the Company for amortization and allowed only in part by the Court is predicated on the following grounds:

1. The complete exhaustion of the Production System property (less salvage) including—

(*a*) The Menifee field gas wells, field lines, etc. (R. 40).

(*b*) The Red Bush field, gas wells, field lines, etc. (R. 40).

2. The termination of the useful life of the entire transmission system (less salvage) (R. 40).

3. The termination of the useful life of the Lexington suburban distribution property (owned by the Company) and other distribution system properties (less salvage) (R. 42).

4. The amortization of the construction overheads and intangible capital, as to which there could be no salvage (R. 45).

5. The termination of the useful life of the distribution system in the City of Lexington for natural gas uses (less salvage) (R. 37, 38).

6. The probable exhaustion of the supplies of the United Fuel in twenty years (R. 11-12, 24, 25, 37). A fact of common knowledge based on judicial decision. *United Fuel Gas Co.* v. *Railroad Commission,* 13 F. (2d) 510, 523; 278 U. S. 300, 312.

7. The exhaustion of the supplies of all other producers now furnishing gas to the appellant (R. 37-38).

8. The impossibility of selling the securities of a natural gas enterprise on the basis of amortization over a longer period than 20 years (R. 37).

9. The termination of the franchise contract at the end of 20 years and with it all right to continue the service (R. 38). A ground sustained by the Kentucky Court of Appeals in *Johnson County Gas Co.* v. *Stafford,* 198 Ky. 208, 248 S. W. 515. We ask the Court to read at this point the

discussion on this subject in the Company's brief filed in the Court below (filed here by the City) at pages 43 to 49.

The franchise contract provides that the rates finally fixed shall continue for a period of two years before either side may move for a modification (R. 34, Sec. 7). It will thus be seen that any error in the allowance for amortization may be remedied after a very short interval.

Mr. Yunker testified as a matter of personal knowledge (based on long experience with the gas production in this territory) concerning Beckner's theoretical reserves, county by county. He eliminated many counties entirely and large portions of other counties in which the non-existence of gas had been proved by actual drilling (R. 27). Subtracting his eliminations would leave a balance of reserves that would be exhausted in about 12 years on the then rate of actual gas withdrawals approximating 30 billion cubic feet per annum (R. 30). The Beckner estimate of one trillion cubic feet, even assuming its actual existence and that it could be economically recovered, would last only 33 years on the basis of annual withdrawals of 30 billion. Furthermore, Yunker testified that the reserves estimated by Beckner in a large tier of counties, even if existent and commercially available, could not be economically delivered through the Company's present transmission lines (R. 30).

The Beckner estimate contains many absurdities. One illustration will suffice. His estimate for Boyd County is 14,580,000 M. c. f., indicating 100 thousand cubic feet per acre (R. 203). This assumes 145,800 acres in Boyd County. The Court will take judicial knowledge of the fact that Boyd County contains 159 square miles, or only 101,760 acres.

In the 30 counties he estimates 368,142,600 M. c. f. at 100 thousand cubic feet per acre (R. 203); this would indicate

3,681,426 acres. If a well were drilled to each 100 acres it would necessitate 36,814 wells. Such wells would vary in cost with depth and location. If the average cost per well were only $5,000 the cost of the gas at the well would be 50 cents per thousand cubic feet. This cost would not include anything for the pipe lines necessary to bring the gas to appellant's transmission line, nothing for compressor stations to transport the gas, and no operating cost for either the wells, the pipe lines, or compressor stations.

Another example is the "Middle Mississippian, 10 thousand" (R. 203). In the table he estimates reserves in 16 counties from this structure. With a reserve of 10 thousand cubic feet per acre one well to 100 acres would produce 1,000 M. c. f. If the entire amount of gas from this well were sold at 50 cents per thousand it would bring $500. A well could not be drilled for any such sum, to say nothing of the additional investment required and necessary operating costs during the time such well was producing. Is it any wonder the Court disregarded the Beckner estimate of gas reserves in fixing its allowance for the amortization of appellant's property?

The amortization allowance is designed to return to the stockholders their investment in the property by the time of the termination of the enterprise. As was said by the United States District Court for the Eastern District of Kentucky in *United Fuel Gas Co.* v. *Railway Commission*, 13 F. (2d), 510, 518, affirmed in 278 U. S. 300:

> "Because of the exhaustible character of his product, the natural gas operator is entitled to receive, through the returns charged, not only his actual expenditures of operation and depreciation charges in the sense of such sum as will keep his plant at 100 per cent operating efficiency, but he is also entitled to such rates as will refund to him his entire capital

> investment within the life of the business. When the field is finally exhausted, as it must be, the reserve for depletion, or amortization reserve, should be sufficient to repay to the investor 100 per cent of the original investment. * * * The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business is universally recognized. This is in addition to what is ordinarily denominated a charge for depreciation or deterioration by use."

In re Baker Natural Gas Utility, P. U. R. 1921E, 609, 626, the Public Service Commission of Montana said:

> "Depreciation and depletion in a utility of this nature are an amortization charge. Were this not so the stockholders would lose their investment and be obliged to content themselves with the interest they had received thereon. Unlike other utilities operating in theory at least, in perpetuity, with the recurring levy for renewals and replacements preserving the investment intact as a going concern, the natural gas utility suddenly ceases on the exhaustion of its natural stores, and its appliances are rendered useless for their original uses. Unless there has been accumulated a money reserve in a depreciation and depletion fund equal to the investment the stockholders must pocket their losses, and, under regulation, this means an end of natural gas development for public uses."

An analogy for the allowance of amortization in natural gas rate cases is found in the Federal Income Tax Act of 1916 (and later enactments) authorizing deductions for the exhaustion of mining property (coal, copper, gas, iron ore, oil, etc.), in arriving at taxable income.

In *United States* v. *Ludey*, 274 U. S. 295, 300-302, the Court said:

"We are of the opinion that the revenue acts should be construed as requiring deductions for both depreciation and depletion when determining the original cost of oil properties sold. * * *.

The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken."

In *Hammond* v. *Public Service Commission*, — Ore. —, 189 Pac. 639, 9 A. L. R. 1223, the Supreme Court of Oregon held that a railroad used to remove the timber to be cut from a tract of land was entitled to charge rates which would provide for the amortization of its cost as well as yield a fair return on the value of the property. In the opinion the Court said:

"* * * the company is entitled to such rates as will fairly compensate it for the service rendered, and for the depreciation of its plants employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and, besides quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant, and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good."

The Company's balance sheet as of December 31, 1926, shows on the *asset* side this item (R. 213):

"Less Depreciation to Dec. 31, 1926—$1,456,400.65."

The balance sheet for December 31, 1927, shows on the *liability* side this item (R. 217):

"Renewals, Replacements and Depletion—$1,662,062.69."

Counsel for the City uses these entries as proof of the existence of an actual fund in the above amounts, and on that ground dispute the right to any allowance for amortization (Reply Brief 23-25).

But both Mr. Kimball (R. 225), and Mr. Hightower (R. 237), testified that there was no such fund. The dividend record (Addition to R. 19) shows that over the period of its first franchise, 1906-1926, the Company declared no dividend in 1906, 1907, 1912, 1913, 1914 and 1915; a dividend of 2½ per cent in 1909 and 1911; a dividend of 5 per cent in 1908 and 1910; a dividend of 6 per cent in 1916 to 1926 inclusive. This "depreciation" item has therefore been built up at the sacrifice of an adequate return to the stockholders. A very large part of it obviously represents capital investment. This item in the balance sheet has no bearing whatever on the fair value of the property used and useful in rendering the gas service, and the argument of the City based thereon is predicated on a false premise.

The allowance for amortization in this case is supported by the evidence, and the Court's finding should not be disturbed.

The Amortization Allowance for the Lexington Utilities Distribution Plant

The Company claimed an allowance for amortizing the value of this plant, less a salvage of about 50 per cent. Complaint is made that no allowance whatever should have been made therefor, on two grounds: (1) the appellant does not own this property, and (2) the Lexington Utilities (successor to the old Lexington Gas Company created by private legislative act prior to the adoption of the

present State constitution) has a perpetual gas franchise. We deem the following considerations sufficient answer to this contention:

1. Presumably the rental paid to the Lexington Utilities Company is sufficient to afford an adequate allowance for amortization. Treating the Lexington Utilities property as part of the rate base (found to be more favorable to the consumer) entitles the Company to an allowance for amortization on that property in fixing a rate for its gas service.

2. The Court may take judicial cognizance of the terms of the legislative grant, and the municipal control over the old Lexington Gas Company prescribed thereby (Acts of General Assembly of Kentucky, 1875-76, page 475). The City was given representation on the directorate, and the management was therefore joint. Not since 1905, when the City sold and appellant purchased the franchise for *natural* gas (the use of which was not contemplated when the Lexington Gas Company was given its charter) has there been any joint control, either of the Lexington Gas Company or of its successor, the Lexington Utilities Company.

3. There was no proof offered as to whether the rights under the original grants still existed or had been abandoned. Having failed to present any proof on the subject the City may not now raise this question.

4. Even assuming that the Lexington Utilities Company has the right to continue its occupation of the streets of the City under the original grant to its predecessor after the expiration of the present franchise, some allowance for amortization must be made. The proper amount was a question of fact to be proved as any other fact. The Court's finding is amply justified by the evidence.

The Allowance for Extraordinary Maintenance

In the City's reply brief counsel assert that "not one dollar of this sum is sustainable by the record". The Company's evidence on this subject is now in the record before this Court (Addition to R. 14, 46-50). The necessity for this allowance is therein adequately explained as covering the unusual repairs required to keep the plant in first-class condition. The distinction between an allowance for amortization (to return the capital investment) and an allowance for depreciation or extraordinary maintenance requires no explanation.

The argument of the City here is not consistent with its admission in the Court below where it adopted the Company's allowance for extraordinary maintenance as fair and proper (Carter's Exhibit 8, R. 191, 192), from which we quote:

> "Depression charge, $21,262.00" (R. 191).
>
> • • • • • •
>
> Estimated annual allowance necessary for extraordinary maintenance (See P. 28, Ex. No. 4, F. B. & D.).
>
> | | |
> |---|---|
> | Central Kentucky Natural Gas Company, Inc. | $12,878.00 |
> | Lexington Utilities Company | 8,384.00 |
> | Total | $21,262.00 (R. 192). |

In their brief in the Court below, a copy of which has been filed here with the Company's Reply Brief, counsel for the City said (pp. 38, 40):

> "So Mr. Carter has allowed the Lexington part of the $20,000.00, some $12,878.00 as an annual charge or expense. In the words of Mr. Kimball, that 'takes care of the depreciation.'
>
> • • • • • •

It is submitted that Mr. Carter was right and fair in adopting Mr. Kimball's annual $20,000.00 depreciation charge, * * *."

The Criticism of the Court's Rate Base

Going now to the City's main brief, and passing the question as to its right to attack the Court's findings of value without taking a cross-appeal, we desire to point out some "inexcusable" errors of counsel in their treatment of this subject, both in their computations, and in statements of fact. The City's argument is somewhat scattered. It appears in part at pages 49-51, and in part at pages 93-96. We shall follow the City's arrangement, directing attention first to its conclusion that the Court's rate base is too high by the sum of $440,574 (p. 96). How counsel can justify any argument whatever on value without bringing to this Court the evidence on the subject is beyond our comprehension. They present only alleged totals as if the evidence from which such totals were derived is quite unnecessary.

But passing this difficulty, we come first to *the Jirgal value* (Brief, pp. 50-51). The City has put into the record Jirgal's adjusted historic or book *cost* of the Company's property as of December 31, 1926, amounting to $1,582,974.63 (R. 229), and also his historic or book *cost* as adjusted by him of the Lexington Utilities property as of the same date amounting to $383,152.66 (R. 229). The City did not put into the record the Jirgal *values* as of said date based on 1926 prices. But his value of the Company's property appears in the Court's opinion as $2,653,035 (R. 83), so counsel were obliged to disregard Jirgal's *cost* figure and use his *value* figure for the Company's property in the Lexington district. However, instead of using Jirgal's value of the Lexington Utilities property, they use his cost ($383,-

152). We feel justified in informing the Court that Jirgal's value of the Lexington Utilities property was $552,001. Using the correct figures counsel for the City should have shown as the total for the Jirgal *value* the sum of $2,013,823, instead of $1,844,974 (p. 50). Jirgal's total depreciated by 9.4 per cent (used by the City) would be $1,814,524, instead of $1,671,547 (p. 51).

Counsel also fail to direct attention to the comment of the Court below in its discussion of the Jirgal value. We quote (R. 83):

> "Jirgal found the historic cost (meaning reproduction cost based on historic cost) of the entire plant, to be $2,653,035, *without giving consideration to any going concern value and some other items, such as gas pumped (purchased) and stored in the Menifee field and working capital.*"

If the Kimball figures for going concern value, $248,000 (Addition to R. 44); for stored gas, $409,663 (R. 40); and for working capital, $83,000 (R. 44), be added to the Jirgal *value* of the Company's property, the total would be $3,393,698. Allocating to Lexington 55.1 per cent of this figure gives $1,869,927, as compared with $1,461,822 used by the City. Adding the Jirgal value for the Lexington Utilities property would make his value for the Lexington district $2,421,928, instead of $1,844,974, used by counsel (p. 50). Depreciated on the basis of 9.4 per cent we would have as the final Jirgal value $2,276,661 instead of $1,671,547 used by the City. It will be seen therefore that counsel was in error in stating on page 51 of their brief, relative to their Jirgal value figure, that—

> "To that rate base then, *the only one free and clear of all conjecture,* the only one unhampered by market conditions, we turn *as a sure guide,* and applying the

> figures to the year 1928, we get *definite and exact record*, and not estimated results."

Counsel take Carter's value based on reproduction cost new depreciated by 27.6 per cent instead of 9.4 per cent, add the Kimball intangibles, and present as the Carter value $1,687,897. They add their computed Jirgal value of $1,671,547, and their "purchase price" valuation of $1,913,157, and obtain an average value on this basis of $1,757,533 (p. 96). We have shown the error in the figures adopted for the Jirgal value. The purchase price is also wrongly stated. Referring to the Carter valuation the Court below said (R. 83):

> "Carter left out altogether some of the items that should be considered in arriving at a fair reproduction cost * * *."

The Court rejected the Carter valuations in toto.

Counsel for the City criticize the Kimball valuation on the ground that his testimony was hearsay. This objection was made in the City's brief in the Court below (which is filed here) at pages 11-17. The argument in the City's main brief appears on pages 93-95, and counsel now seek to have this Court sustain their contention. They have apparently overlooked Supreme Court Rule No. 16. The record does not show that any objection was made or exception reserved to the admission or consideration of the Kimball evidence. It is thus apparent that even if it were open to the City to attack the Court's rate base, the figures offered by it are erroneous.

The City's brief (pp. 51-52) presents figures claimed to show a net income under a 45 cent rate based on 1926 conditions of $156,615, or a return of 9.4 per cent on the alleged Jirgal value of $1,671,547. However, as the com-

puted Jirgal value figure used by the City is grossly erroneous the calculation and deduction made are unimportant.

The United Fuel Gas

The Owsley County gas and the United Fuel gas are treated as if they were opposite flanges on a revolving door, and that when one was pushed in the other was automatically pushed out. But there is no relation whatever between the two. The Owsley County gas (delivery of which began in November, 1927) was purchased pursuant to the Franchise Contract obligation, and for that reason alone the cost of the gas must be included as an item of expense. The City has conceded this at all times.

The inter-corporate relation growing out of the purchase of the Company's capital stock by Columbia Gas & Electric Corporation did not arise until the early part of 1928 (R. 85). The sole question is whether the City, or Commission, or Court, may as a matter of law (by reason of that relationship) disregard the Company's contract with the United Fuel, and not only require the United Fuel to furnish the quantities of gas as fixed in its contract, but also to furnish in addition all of appellant's requirements in excess of the Owsley County minimum of 750,000 M. c. f. at 12½ cents instead of at the price fixed in its arms'-length contracts. What counsel for the City mean when they reiterate the refrain "When the Owsley gas comes in, the United Fuel goes out," is that after the Owsley County gas comes in the United Fuel gas remains in, plus all additional gas the Company might need, at the arbitrary and inadequate price of 12½ cents per M. c. f.

We do not consider it necessary to argue this proposition. The Court below ignored or overuled the contention as to all gas purchase contracts, and held that the United Fuel contract must be sustained as an arms'-length agreement. We will not therefore burden this Court with a de-

tailed consideration of the City's calculations concerning the cost of gas appearing in its main brief (pages 54, 55, 57-59, 98-100) constructed on the theory of repudiating all gas purchase contracts other than that for the Owsley County gas.

City's Attack on Decision of Trial Court.

The City's reply brief reasserts the right under the doctrine of the *Langnes* case to attack the reasoning and findings of the Court below without taking a cross appeal. We desire to supplement very briefly our contra argument contained in the briefs already filed by appellant.

The City attacks the decree under the guise of upholding it. The entire argument of the City rests upon the proposition that the Court below in refusing to enjoin the Commission rate of 45 cents in effect held such rate to be reasonable. But the decree may not properly be so construed. The City also seeks to have this Court hold that certain specific findings of fact were error. Its contentions may be summarized as follows:

1. The Court fixed the value of the Company's property, the value of the Lexington Utilities property, and the total value of the property allocable to the Lexington District (R. 98). The City seeks to have this Court find these values excessive, but the amount of the alleged excess is left to speculation. The evidence is not here.

2. The Court specifically finds the Commission rate of 45 cents to be confiscatory and invalid (R. 89, 99); and finds a 50 cent rate reasonable, and orders a distribution of the impounded fund on that basis (R. 89, 100). The City attacks the 50 cent rate as excessive and seeks to have this Court find the 45 cent rate reasonable, and that the Court below was in error in holding a 50 cent rate to be reasonable.

3. The Court found the Company was entitled to allowances for amortization and extraordinary maintenance for its own property and also for the Lexington Utilities property, operated under lease, and fixed these allowances (R. 87-88). The City attacks these findings and asks this Court to reverse them.

It seems apparent, therefore, that the City's contention that it is merely seeking to uphold the decree is incorrect. Even if all of the essential evidence were now here, the right of the City to thus attack the decree below without taking a cross-appeal finds no support in any decision of this Court. If the City's contention as to a single one of the alleged errors now pressed upon the Court were sustained, it would necessitate a reversal of the decree.

In addition to the authorities cited in our main brief (pp. 82-84) regarding the right of the appellee to contend the Court below committed error without taking a cross-appeal, we cite the recent case of *Neece* v. *Durst*, 61 F. (2d) 591, 597 (Ninth Circuit), wherein the Court said:

> "* * * we are not considering any of the testimony given by the bankrupt when called by the appellee for cross-examination under the State statute (Code Civ. Proc. Cal., Section 2055), since the lower Court held that 'the special master's ruling in allowing an examination of the husband was erroneous in two respects'. No cross-appeal has been taken in this case, and the Court's ruling must stand."

Due Process

In their reply brief (pp. 5-17) counsel for the City make the same argument on the subject of due process which is made in the original brief; and to which we responded in our reply brief (pp. 27-31).

The principle is well established that a rate for a utility service must stand the test for confiscation in a Court of competent jurisdiction regardless of any machinery that may have been erected by statute providing for hearing before a legislative body or agency. The question must always come to a Court determination *de novo,* as to whether the legislated rate is *in fact* confiscatory.

The argument of counsel for the City is fully and conclusively met in the opinion of the trial Court, rendered in this case with reference to the question of its jurisdiction (37 F. (2d) 938).

VIII.

Response to Brief of Additional Appellees.

The brief filed today on behalf of Mrs. Hignight and others was not received by counsel for appellant until late yesterday (November 5th). We will comment briefly on the following items or subjects discussed therein:

1. *Jurisdiction* (Brief, pp. 3-9). The statutes of Kentucky make no provision for appeal to a State Court from an order of the Railroad Commission fixing rates. (See, Opinion of Statutory Court, R. 68.) Section 201*e*-17 cited by counsel merely regulates the making and enforcement of awards. In such proceedings the validity of a rate cannot be attacked. The only remedy against a confiscatory rate is by an original proceeding in equity for injunctive relief. *L. & N. Railroad Co.* v. *Greenbrier Distillery Co.,* 170 Ky. 775, 786.

2. *Petroleum Exploration Contract* (Brief, pp. 10-12). Section 23 of the Franchis eContract does not require the Company to itself build, own, and maintain the second pipe line as stated by counsel (page 11). The contract provides that the Company shall "begin or cause to have begun * * * the construction of and have in operation or cause to be operated * * * an additional main line * * * to

the distribution system in the City of Lexington; * * *." This requirement was complied with through the contract with Petroleum Exploration for the Owsley County gas, and has been accepted by all parties concerned as full compliance with the provisions of said Section 23.

3. *Amortization* (Brief, p. 19). The fact that neither the statute nor the franchise contract specifically mention amortization is of no significance. The right to such an allowance is a question of law. The proper amount is an issue of fact.

On pages 26-28 counsel quote from the recent decision of the Supreme Court of Ohio in the case of *Columbus Gas & Fuel Co.* v. *Public Utilities Commission*, 127 O. S. 109, which held the Ohio statute did not permit an allowance for amortization. There is no such statute in Kentucky. Furthermore, we understand the Columbus case has been appealed to this Court, and the constitutionality of the Ohio statute remains to be determined.

The remaining matters discussed in this brief have been fully treated in the briefs by appellant.

Conclusion

The evidence establishes that the rates promulgated by the Company are reasonable, and much less than required to yield it even the 7 per cent return which the Court held was fair. The decree should be reversed with directions to enter judgment sustaining the Company's rates.

Respectfully submitted,

HENRY T. DUNCAN,
DYKE L. HAZELRIGG,
CHESTER J. GERKIN,
Counsel for Appellant.

November 6, 1933.

IN THE

Supreme Court of the United States

No. 779. In Equity

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, BAILEY P. WOOTTON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY, CITY OF LEXINGTON, A MUNICIPAL CORPORATION, S. B. FEATHERSTON, INDIVIDUALLY AND AS REPRESENTING ALL OTHER PERSONS SIMILARLY SITUATED,
Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky

BRIEF FOR THE APPELLEES

ROBERT H. WINN, *Mt. Sterling, Ky.,*
C. M. HARBISON, *Frankfort, Ky.;*
BAILEY P. WOOTTON, *Frankfort, Ky.,*
S. H. BROWN, *Frankfort, Ky.,*
Attorneys for Appellees

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Where a due process commission, duly empowered thereunto by the state, has, through an orderly hearing, fixed a public utility rate, no court is at liberty to substitute its own conclusions for those of the commission, unless and until the court, inspecting the commission record, first is convinced that the commission's fixation rested, not upon testimony or reason, but upon an arbitrary or capricious fiat 1–15

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Appellees.

BRIEF FOR THE APPELLEES

The appellees in the preparation of this, their brief, will, in compliance with the court's rule, make no historical nor fundamental statement of the facts in the record. They will content themselves with manifesting

to the court certain errors of statements (as they conceive them to be) in the brief for the appellant, as they, and the deductions flowing from them, may come up for discussion.

Enough will have been gathered from the brief for the appellant to make apparent what is here. As the minds of the court will have caught from that paper, there are certain elemental differences between the positions of the parties which are apparent enough, but which perhaps had best be concretely set forth here. The major differences are these:

First. The date of the natural gas franchise contract between the City of Lexington and the Gas Company is January 28, 1927. Both sides addressed their main proof to December 31, 1926. The three-judge court adopted this date of December 31, 1926, as the date for its decision. The brief of the appellant contends that the court should have taken that date to ascertain values, but should have taken a date of near a year later, when certain high priced gas bought by the appellant had first come into the picture, for the ascertainment of operating expenses, revenue, return, and the like. The trial court and the appellant are at sharp divergence. Here are their respective statements:

(a) The court says in its opinion (Record, p. 85) that "we are asked to fix the rate base and determine the income as of December 31, 1926." Then, on July 29, 1932, the court, in an order (Record, p. 90) overruling a petition for modification of the opinion, said this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's property allocable to Lexington as of De-

> cember 31, 1926, and determine whether the rate established by the Commission aforesaid is a reasonable rate on such values as of said date. The court having acted upon such requests and made its findings and determinations as of said date * * * it is ordered that the petition for modification and amendment of the opinion be denied."

(b) In its brief here the Gas Company makes categorical denial of what the trial court said. It said (and there could not be a much more direct contradiction of the recital of the three disinterested judges) this:

> "The court was never requested at any time by any of the parties to determine the validity of the Commission rate as of December 31, 1926, and there is absolutely nothing in the record to support such statement."

We will revert later in this discussion to this diametric conflict.

Second. The appellant would have it that the appellees are not to be permitted to reach the trial court's conclusion through a route of reason other than that followed by the trial court. The trial court's decree left in effect the 45-cent rate of the Railroad Commission; and it is thought by the appellees that they have the right to reach that rate through reasoning processes, and the adoption of figures, other than those employed by the court, and to differ with certain theories, or conclusions, if you will, adopted by the trial court. And since this is one of the major points stressed in the appellant's brief, and since much of the discussion in this paper for the appellees turns upon the right of the appellees to reach the court's result through their own processes of reasoning, we develop now the authority

upon the subject—contenting ourselves with what this court has written in three of its later cases:

Langnes vs. Green, 282 U. S. 531, s. c. 75 L. Ed. 520. Here the court said:

> "But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

United States vs. American Railway Express Company, 265 U. S. 425, s. c. 68 L. Ed. 1087, thus puts it:

> "The Southeastern insists that these claims, although adequately presented in the bill of complaint, cannot be availed of in this court, because they were overruled by the District Court and the American did not take a cross appeal. The objection is unsound. It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it."

In *United Railway and Electric Co. vs. West et al.,* 280 U. S. 234, s. c. 74 L. Ed. 390, quoted *post* herein, the court said that a matter contested throughout and a

necessary element in the ascertainment of a fair rate, might be considered on the appeal at the instance of the appellee without cross appeal or *certiorari*.

The philosophy of these cases is sound, it is submitted. It is not that an appellee may, without cross appeal, reach any result other than that of the decree. *Per contra*, it is that the appellee may reach the *same* result as that fixed in the decree, though he may reach that result by different mathematics, a different process of reasoning, or a different application of the subjects discussed by the court. In so doing the appellee argues not in opposition to the decree, but in support of it.. The principle is as old as jurisprudence itself, that the decree of a trial court will be affirmed if it be right, notwithstanding that the reasoning of the trial court in reaching the decree be wrong. The trial court's decree here declined to enjoin the 45-cent rate emanating from the Railroad Commission. The trial court declined to enjoin it for certain reasons assigned in the opinion. What we do under the authority of these cases, and under their privilege, is to argue that the court could do no less than to leave effective the 45-cent rate for reasons other than those employed by the trial court. The purpose of an appeal, of course, is to alter, or set aside, the effect of a decree or judgment. A decree imputes finality. It is to be altered only by an appeal. That is what the appellant endeavors to do here, to secure through the channel of this appeal a different result from that reached by the trial court. So if the appellees sought to reach here a different result, *i. e.*, to change the 45-cent rate left in effect by the decree, if they wished to make that rate lesser, they would need to take out their cross

appeal; but they do not conceive it that any appeal is necessary to *sustain* the decree; and they do conceive it that within the dictates of fair reason, and within the declaration of the authorities, *supra*, they may stand behind the decree, fortified by ramparts other than those erected by the trial court. This principle will run through much of appellees' discussion. So, out of sequence, and before any effort at orderly presentation by the appellees of their side of the controversy, they have thought well to develop this underlying element in the work in this paper.

Third. The trial court found a 7 per cent rate of return to be fair; and of this the Gas Company complains. There will be certain, not extended, discussion of this matter as well in this paper.

In addition to these matters of controversy as propounded by the appellant, the appellees think that there are other subjects for consideration in the record, favorable to their side, which will be discussed in due order, and which are set forth in the index preceding this paper.

This, a public utility rate case, is to determine whether a natural gas rate fixed by Kentucky's authorized body, the Railroad Commission, for the sale of gas at Lexington, Kentucky, is "confiscatory." In passing, it is to be reflected that that much employed and most misleading word has no place in the Constitution; and unless "to confiscate" be limited in its intent as coequal with "to take without due process of law" it should be eliminated from the rate case vocabulary. And the terms are not synonymous. The fundamental intent of

"confiscate," as defined by the lexicographers, is a *seizure* of property, and its application to a public use. That concept of a seizure has a sinister and disagreeable intent. To hear the word invites a sort of spiritual hostility. The prohibition of the Constitution has no such instinctive animus against the exercise of fair reason. It, in fairer words, says that property shall not be taken without due process of law. It was not a guileless lawyer who first brought "confiscate" into the vernacular of these cases; for he brought in an idea, unpalatable to our mental impulses, that the makers of the Constitution did not put there. But the use of the word here happily serves to clarify and accentuate this opening point for the appellees:

I.

Where it appears from the record that there has been a *hearing* in some agency of the state, either in a rate-deciding commission or in a duly constituted court, the federal court may not and will not interfere against the state fixation or decree unless it be made to appear that the state tribunal's decision was the result, not of deliberation and decision, but of passion or prejudice; or was withal so unsupported by any evidence as to manifest that the decision was wholly arbitrary. The court will not weigh and consider the record from the state tribunal to ascertain whether the latter reached a sound conclusion; nor will it weigh the evidence to determine whether it preponderates for or against the conclusion arrived at; for to do so would be an arbitrary substitution of a federal court's conclusion for that of a state

tribunal, reached upon the exercise of its duly delegated statutory functions. The federal court will be restricted, therefore, to an investigation of the record only so far as to ascertain, not whether it agrees with the state tribunal's due-process decision, not whether its due-process decision was right or wrong, but whether its conclusion was so arbitrary, so capricious, as to convince the mind that it was arrived at without evidence to support it. The rule is the same whether federal jurisdiction be invoked directly, as here, or on appeal from a decision of a state court.

Now let us again state this, for we desire to be clear, to make ourselves clear. The bill filed by the appellant in the three-judge court sets up the constitutional and statutory creation of the Railroad Commission (Record, p. 2); and how appellant agreed in its franchise contract that it and the City of Lexington should take their rates to the Railroad Commission for fixation, under the pertinent sections, 201e-1 to 201e-20 of the Kentucky Statutes (Record, p. 4); and how the matter of the rate "was duly heard by said railroad commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainant and this company, and said case was submitted on the pleadings, proof and exhibits" (Record, p. 5). So, from the bill we have it that there was a rate fixation, under orderly statutory processes, by a duly constituted body, which received pleadings, heard evidence and decided. Under these conditions we submit it that the primary limit of the federal court's inquiry is, not whether the Commission's rate was right, nor whether the rate, eventuating from the Commission's trial was that rate which might

have eventuated from an original admeasurement by the court, but whether, and solely whether, the Commission's decision was so meretricious, so arbitrary, and so unreasonable, as to permit the court wholly to disregard it, and to substitute its own rate concepts for those of the Commission. And it is from that viewpoint, it is respectfully submitted, that the court must approach this case. We rest upon the following authority:

Louisville & Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298, a case dealing with rate fixation by that same Kentucky Railroad Commission complained of here. The position of the railroad was that the question of the reasonableness of a rate was eminently a question for judicial investigation, and that if the rate be fixed in the absence of investigation by judicial machinery, there was *ex necessitu* a violation of the prohibition against taking without due process. This court denied this contention, saying:

> "And accordingly, if it appeared in the present case that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power —one that should not be resorted to unless the reason for doing so is clear and unmistakable."

Louisville & Nashville Railroad Company vs. Garrett et al., as The Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229. This court, in passing upon the matter, remarked that "the Commission set the matter for hearing; that the parties were heard; that each party produced a number of witnesses, and that the appellant, represented by counsel, was permitted to cross examine the witnesses." The court then decided that "courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment, with respect to the reasonableness of rates, for that of the legislature or of the Railroad Commission exercising its delegated power." Then the court further proceeded to make this clear and conclusive statement:

> "It may be assumed that the statute of Kentucky forbade arbitrary action; it required a hearing, the consideration of the relevant statements, evidence and arguments submitted and a determination by the Commission whether the existing rates were excessive. But, on these conditions being fulfilled, the questions of fact which might arise as to the reasonableness of the existing rates in the consideration preliminary to legislative action would not become, as such, judicial questions to be re-examined by the court."

The Kentucky court of last resort in *Southern Ry. in Ky. vs. Frankfort Distillery Co.,* 233 Ky. 771, 777, quotes, just as we have quoted, from the foregoing *L. & N. vs. Garrett* case and upholds a proceeding before the Commission as a due process hearing.

Kansas City S. R. Co. vs. United States, 231 U. S. 423, s. c. 58 L. Ed. 296. Here the court tersely said of

an effort to attack in the courts a finding of the Interstate Commerce Commission upon due hearing this:

> "So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review."

Railroad Commission vs. Cumberland Telephone & Telegraph Co., 212 U. S. 414, s. c. 53 L. Ed. 577. The court below was of opinion that the telephone rates fixed by the Railroad Commission of Louisiana were fixed "by mere arbitrary conjecture by the Commission, not based on investigation or the exercise of judgment and discretion," and the lower court therefore enjoined the rates. The decree was reversed by the Supreme Court. It said:

> "Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon the investigation, the Commission may have come to a mistaken conclusion by reason of erroneous influences from the evidence furnished by complainant's own returns, but that is far from showing that the Commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge whatever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it."

Interstate Commerce Commission vs. Union Pacific Railroad Co., 222 U. S. 541, s. c. 56 L. Ed. 308. In this case the District Court for the District of Minnesota had enjoined certain tariffs promulgated by the Interstate Commerce Commission. The Commission answered, and set up the fact of a full hearing. The District Court was reversed, and the Supreme Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience' (*Illinois C. R. Co. vs. Interstate Commerce Commission*, 206 U. S. 441, 51 L. Ed. 1128, 27 Sup. Ct. Rep. 700). Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Washington ex rel. Oregon R. & N. Co. vs. Fairchild et al., Railroad Commissioners of the State of Washington, 224 U. S. 510, s. c. 56 L. Ed. 863. Here there was a hearing by the Oregon Commission as to the necessity for certain additional trackage. The matter for decision went up to the highest court of Washington, which dismissed the bill. It then proceeded to this court. The Supreme Court remarked that the carrier had had its full hearing, and then this:

> "If, then, the defendant had notice and was given the right to show that the order asked for, if granted, would be unreasonable, it has not, in this case, been deprived of the right to a hearing. That being so, it leaves for consideration the contention that, as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony, or of deciding upon pure questions of fact, but, as said in *Kansas City Southern R. Co. vs. C. H. Albers Commission Co.*, 223 U. S. 591, *ante* 565, 32 Sup. Ct. Rep. 320, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.'"

Interstate Commerce Commission vs. Illinois Central R. Co., 215 U. S. 452, s. c. 54 L. Ed. 280. The matter up there for consideration was a certain car distribution order made by the Commission. The court, in denying the right of a judicial review, and in meeting the arguments made by the carrier, said:

> "Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specifically refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

People ex rel. New York & Q. Gas Co. vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337. This case involved an order of the New York Public Service Commission about certain gas service. Its position is best set out in the second syllabus, thus:

> "While the Federal Supreme Court has no authority on writ of error to a state court to substitute its judgment for that of an administrative body, such as a state Public Service Commission, as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, it will enter upon such an examination of the record as may be necessary to determine whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission, as to deny the invoked constitutional right to due process of law."

Then, in concluding its opinion, the Supreme Court expressed its conception of judicial power with respect to due process rate-hearings before public commissions, thus:

> "We agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore that, even if the courts differed with the Commission as to the expediency of the order, they are without authority to substitute for its judgment their views of what may be reasonable and wise."

Interstate Commerce Commission vs. L. & N. R. Co., 227 U. S. 88, s. c. 57 L. Ed. 431. Here Mr. Justice Lamar wrote for the court that rate orders "*quasi*

judicial in character" were void "if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the indisputable character of the evidence'." Then the opinion concluded:

> "The order of the Commission * * * was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body."

Is not the foregoing exposition of the attitude of the federal courts in exact accord with the common sense of the matter? It seems to us that it is, and this for the reason that there is nothing in the Fourteenth Amendment to require as due process the application of the energies and the independent deciding processes of two distinct bodies, the one as fully clothed as the other to hold sittings, to hear evidence, receive pleadings, hear arguments and to render decisions. And, upon the other hand, it is, of course, open to the federal courts always to inquire whether there has been a hearing that is in fact a hearing, as upon the one side, as against, upon the other side, a pseudo-hearing, resulting in a decision so arbitrary as in fact to constitute no hearing. And in the latter case the federal court may act, while in the former it may not. That, we submit, is the limit of the right, the "jurisdiction," if you will, of the federal or other courts to scan and consider rate fixations emanating from the Kentucky State Railroad Commission. There seems to rest in the minds of the lawyers and suitors who have had to do with many Kentucky litigations a singular inability to consider, or an obstinate unwillingness to con-

sider, how the hearing conducted before the Kentucky commission itself affords "due process." Let us see:

II.

A hearing under Section 201e-1, and following, of the Kentucky statutes, is a due-process hearing. It is not essential that due process be exercised, be available, alone in some one or another court proceeding. Boards and bodies set up by paramount law and empowered by such law to decide upon due investigation, and upon due opportunity to the interested parties, for hearing, are just as much the vehicles of due process as are the duly constituted courts of the land. The principle has been recognized repeatedly. Perhaps the best and most succinct statement of it is to be found in *People vs. Apfelbaum,* 251 Ill. 18, s. c. 95 N. E. 995, thus:

> "Due process of law does not necessarily imply judicial proceedings. Orderly proceedings according to established rules which do not violate fundamental right must be observed, but there is no vested right in any particular remedy or form of proceeding. A general law, administered in its regular course according to the form of procedure suitable and proper to the nature of the case, conformable to the fundamental rules of right and affecting all persons alike, is due process."

The Illinois writer cites as sustaining this proposition (and they do sustain it) these cases:

Den vs. Hoboken Land Company, 18 How. 272, s. c. 15 L. Ed. 372;

Kelly vs. Pittsburgh, 104 U. S. 78, s. c. 26 L. Ed. 658;

Ex parte Wall, 107 U. S. 265, s. c. 27 L. Ed. 552.

To these we add:

Reetz vs. Michigan, 188 U. S. 505, s. c. 47 L. Ed. 563. In this case the question was whether a hearing held by the Medical Board of Registry upon the eligibility of one desiring to practice medicine was due process of law. The Supreme Court held that the hearing did afford due process, and this without more.

Hurtado vs. California, 110 U. S. 516, s. c. 28 L. Ed. 232. In this case it was said:

> "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Palmer vs. McMahon, 133 U. S. 660, s. c. 33 L. Ed. 772. Here the court succinctly put it:

> "The phrase 'due process of law' does not necessarily mean a judicial proceeding."

Now, as within these general principles, let us turn to the Kentucky statutes, Section 201e-1, *et seq.,* under which the 45-cent rate complained of was arrived at, and particularly let us consider Section 201e-14, wherein it is provided that when a natural gas complaint is made,

> "said Commission shall give the company complained of not less than ten days' notice * * * of the time and place of the hearing of same, also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company is or has been guilty of extortion said Commission shall make and fix a just and reasonable rate."

That assuredly provides for a full hearing. Then we may very well ascertain from the bill itself whether the company had such hearing, such a due-process hearing. We find at Record page 5 of it this:

> "Plaintiff says that said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants (City of Lexington, etc.) and this Company, and said case was submitted on the pleadings, proof and exhibits introduced by the parties thereto * * * and written briefs thereafter filed by the respective parties."

These proceedings were before a public commission, created by Kentucky's Constitution, and duly empowered by its statute law. Why was not this hearing one of due process?

Next the court is asked to turn to Section 820a-1 of the Kentucky Statutes, wherein provision is made for hearings by this same commission over railroad rates in precisely the same words; the very same words, as those just quoted, *supra,* from Section 201e-14 as providing for hearings on natural gas rates. As well, Section 829 of the Kentucky statutes provides for hearings before the Railroad Commission, in words not the same, but in intent the same, covering the same subject matter of railroad rates. With these statutes in mind, with their intent impossible to be differentiated from the gas hearings statute, let us consider whether these hearings afford "due process" as within the attitude of the Supreme Court upon the subject. It came up for consideration in *Louisville and Nashville Railroad Company vs. Finn and others, constituting the Railroad Commis-*

sion of Kentucky, 235 U. S. 601, s. c. 59 L. Ed. 379. It was urged as against the act of the Railroad Commission that, "because in the proceeding before the Commission there is no formal issue, and no method of requiring the production of evidence" there was wanting due process of law. The court answered this, denying the contention, thus:

> "We have already seen that there was evidence to support the Commission's affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant's present attack upon Section 829 *as repugnant to the due process provision of the 14th Amendment.* In the proceeding before the Commission there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired."

There the attack was made upon a hearing before this same commission upon the ground that the hearing did not afford due process; and this court, saying that there had been evidence to support the commission, said that there was "no basis" for the contention. The bill in the instant case affirmatively sets up the amplitude of the hearing on these gas rates upon pleadings and evidence and argument. And if in that Kentucky case a hearing before the Kentucky Railroad Commission afforded due process as within this court's view, it is respectfully submitted that the Gas Company had its due process in the hearing which it pleads that it had before this same commission.

Whether a rate made upon a hearing before the Railroad Commission, under these same statutes, was a rate made, with a consequent taking of property under

it, without due process of law, was presented and answered by this court in *Louisville and Nashville Railroad Company vs. Kentucky,* 183 U. S. 503, s. c. 46 L. Ed. 298. The contention was directly presented, had the court's equally direct attention, and met a denial from the court in these words:

> The railroad contends "that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States."

The court answered this contention, and as well the further one pressed in this brief that the courts are limited to the question of arbitrary action, thus:

> "We are not prepared to accept the view that the Railroad Commission, in acting under Sec. 218, is merely an administrative body, and as such, subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the Commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects

> to resort to the Commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the law provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them, whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud, or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Let it be remembered that the Gas Company, too, took the subject of its rates to this same Commission by its own express agreement. (See Section 4B of the franchise, Record, page 32.)

Again, in *Louisville and Nashville Railroad Company vs. Garrett and others, as the Railroad Commission of Kentucky,* 231 U. S. 298, s. c. 58 L. Ed. 229, this same Commission and its control over rates, and the question whether its hearing processes constituted due process, came up for consideration; and as well the further contention that the absence from the Kentucky Railroad Commission statute of any direct provision for an appeal to the courts, invalidated it as wanting in due process. And the court said:

> "Undoubtedly, a state may permit appeals to its courts from the rate-making orders of its railroad commission, and, upon the review of such

> orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, even to act legislatively (*Prentis vs. Atlantic Coast Line Co.*, 211 U. S. 210, 227, 53 L. Ed. 150, 159, 29 Sup. Ct. Rep. 67). But the guaranties of the Fourteenth Amendment do not entitle the carrier to the exercise by the courts of such extra-judicial authority."

This court as late as March of the current year, in *Roberts vs. Richland Irrigation District,* Pamphlet 11, Law. Ed. Advance Opinions, page 667, has redeclared this restriction binding it in against interference with duly made state rates, where it said that as against assessments for local improvements "the burden of taxation cannot be assailed under the due process clause of the Fourteenth Amendment unless palpably arbitrary and a plain abuse." It has become (in the absence of the presentation of this question) altogether too common an assumption that the federal courts could substitute their own judgments, and their own views, for those of the duly constituted local hearing authorities. We are not unmindful in pressing this point that the three-judge court which heard this case below, in a former appearance of the case (*Central Kentucky Natural Gas Company vs. Railroad Commission of Kentucky,* 37 Fed. (2d) 938), expressed its view that the court should hear the case *de novo*. That this decision is in conflict with everything that has been written by this court upon the subject, there can be little doubt. And that very opinion, however, remarked that the court was "not to be understood as holding that the parties may not by agreement try the case before us upon the same evidence heard by

the Commission," and in the statement just preceding this quotation, the court indicated that had the hearing been by agreement cast upon the evidence heard by the Commission, the court would have considered it solely to test whether it was arbitrary and capricious. And after that opinion was written the case was submitted (Record, p. 77), and heard and decided by the trial court upon that same evidence, neither more nor less than that heard by the Railroad Commission. The trial court (at the foot of record page 82) says that "the case is submitted on the evidence heard by the Railroad Commission."

And upon these considerations, therefore, it is submitted that the bill itself manifests that in the extensive hearings had upon pleadings, proof and briefs, complainant company has already enjoyed its constitutional right to a due process of law. The charge is not lightly made. There has grown up a sort of notion that there is not due process of law unless the law be court-administered law. The notion is as unsound as its unaccountable prevalence. Lawyers and courts alike seem to have had a sort of ingrown conception that until there has been a lawsuit there was no due process. The instant bill seems to rest uopn that same erroneous understanding of the law, for otherwise it assuredly would not have pleaded the quoted fullness (*supra*) and completeness of the commission hearing. And it follows, if we be correct in what we have said, and in our application of the decisions, that the original bill was wanting in equity, and manifested no ground for judicial interference with the decision of another of Kentucky's constitutional

hearing bodies, proceeding under the due formalities of the law.

If we be correct in the foregoing, the Gas Company's sole access to the court below was through the gateway of its amended bill (Record, page 59), wherein the company first asserted that the Commission hearing was meretricious and arbitrary. The amended bill, in the fact of its filing, concedes, it is submitted, what has been said here. It evidences the company's recognition of the prior insufficiency of its bill. It is fair to deduce from the fact of its filing how the company perceived that, under the statutory and constitutional powers conferred upon, and in this hearing exercised by, the Railroad Commission, it had had its day, its due process. And it gave, we think, assent to our position, *i. e.*, that the only avenue from this decision of the Kentucky Commission up to the courts, in this alleged case of confiscation, must lead through the basic charge that the state hearing was not upon the merits, was not in fact a hearing, but that the rate proceeding from that hearing was no more and no less than capricious and whimsical.

III.

So with the boundaries thus definitely set and fixed by this court, let us see whether the trial court kept within its field. It is submitted that it did not. Upon the contrary it approached the record just as if there had been no hearing before, and no decision by, the Commission. The opinion of the trial court (Record, p. 82) clearly discloses the trial court's attitude of mind about, and course in the decision of, the case. It went into the

record *de novo*. It discussed for itself the evidence about, and it ascertained for itself and fixed, the rate base value. It made up its own accountings of expenses and income. It arrived at its own figures on amortization and depletion. It just tried the case on its own conceptions of the merits. It evaluated for itself the testimony. The work of the Commission was not considered, not weighed, not mentioned. There was no effort to ascertain whether its result was upon evidence, or whether it was arbitrary. It expressed no view that the Commission had not accorded the parties a full and fair trial. It took the case on that very same record that was made up in the Commission hearing (Record, page 77). It received no new proof. In the end it substituted its own views for the due process views of the Commission. We reassert our right, as litigants, to differ with the reasoning of the trial court, and yet to reach the same end. We may take the 45-cent rate emanating from the Commission, left intact by the court's decree; and at the same time may urge that the court should have permitted the rate to stand, not upon any primary measuring out of the matter by its own mental processes, but upon its ascertainment, as it must have ascertained, that the Commission's action was not arbitrary. That we have the right, through wholly different mental processes, to arrive at the result fixed by the trial court's decree is settled by the wholly sufficient authorities, *supra*, of *Langnes vs. Green*, 282 U. S. 531, s. c. 75 L. Ed. 520, and *United States vs. American Railway Express*, 265 U. S. 425, s. c. 68 L. Ed. 1087.

We, within that right, do urge it that the trial court left undone what it ought to have done, and that it did

those things which it ought not to have done. It left undone any ascertainment of whether the Commission's result was upon reason. It took the case and decided it upon its own original inspiration and conceptions, as it ought not to have done.

It is submitted that this court, upon this hearing, will restrict itself to that inquiry. It may properly, it must lawfully, we deferentially submit, take the record as upon the query of arbitrary and meretricious action by the Commission. And finding no suggestion even of meretricious action the case will stand for an affirmance of the decree below which left effective the due process rate found by the Commission.

IV.

With the reservation founded upon the authority cited above that the courts, trial or appellate, have no right to interpose their own views for those of the Commission, until and unless there has been a prior ascertainment by the courts that the Commission's result was without reason, we proceed to discuss the case as though it rightfully were one of first impression in the trial court, and as though that court had the original right to decide upon the merits. We are impelled to take this course by the natural sense of prudence inhering in every litigant, in every lawyer. And we are happy in taking this course because it works out two desirable results:

(a) Not only that there was no prejudicial disregard by the Commission of the merits of the matter,

(b) But that above and beyond that the Commission's decision was fair.

The appellant here finds no fault with the ascertainment of the rate base values by the trial court. Boiled down, the assignment of errors solidifies into these two elements:

(a) The failure of the court to find a rate base value, operating expenses, and the like, on dates other than December 31, 1926.

(b) As a corollary to (a), the failure of the court to include the Owsley County forty-cent gas.

V.

Upon (a): In the assignment of errors V and VI (Record, pp. 105-6) it is complained that the court erred in fixing the rate base and in determining the income as of December 31, 1926; and in failing and refusing to determine these items as of January 28, 1927, the franchise date, and as of December 1, 1927, the beginning date of the sixty-cent temporary rate, and as of October 9, 1929, the date of the rate order.

Now the course of the court, in resting its fixation as upon this date, was amply fortified. It was exact. That statement rests upon these grounds:

1. The date was adopted at the invitation of the parties. The opinion of the court (Record, p. 84) states that "both parties desire the valuation to be fixed" as of December 31, 1926; and that "we are asked to fix the rate base and determine the income as of December 31, 1926." But the Gas Company, finding the results as of its own invited day to be undesirable, asked for revision or modification of the opinion, and the adoption of other basic dates. The trial court, however, denied the re-

quest. The facts were fresh in the minds of the judges. The hearing had been only a little while before. Their energies and reasons had exercised themselves, following the hearing, as of December 31st, 1926. When they wrote, they wrote incidentally about the request for that date. When later they were asked to adopt different dates, when their minds and memories were addressed precisely to that subject, they wrote of the matter, not incidentally, but directly; and fresh from the transpirings and events of the hearing, in an order entered on July 29th, 1932 (Record, p. 90), said this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's property allocable to Lexington as of December 31, 1926, and determine whether the rate established by the commission aforesaid is a reasonable rate on such values as of said date. The court having acted upon such requests and made its findings and determinations as of said date * * * it is ordered that the petition for modification and amendment of the opinion be denied."

We are entitled to rely, of course, upon the integrity of what the three judges of the trial court thus stated and thus reiterated. This court's attitude of mind, its expression of its mental assurance in resting upon what the trial courts may recite in their opinions, is asserted in *Virginian Railway Co. vs. United States*, 272 U. S. 658, s. c. 71 L. Ed. 463, where you said:

> "Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts. For

> being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by requests for rulings. The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal. And the appellate court, being without knowledge of the grounds of the decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor."

Railroad Commission of Wisconsin vs. Maxcy, 281 U. S. 82, s. c. 74 L. Ed. 717. Here a three-judge court entered an injunction against certain rates made by the Railroad Commission of Wisconsin, but the court "gave no opinion." This court reversed the three-judge court upon that ground alone, because "this court should have the aid of appropriate findings by the District Court of the facts which underlie its conclusions."

Hammond vs. Schappi Bus Line, 275 U. S. 161, s. c. 72 L. Ed. 216. Here the court stressed the importance of opinion discussion by the lower courts familiar with the local laws.

Lawrence vs. St. Louis-San Francisco Railway Company, 274 U. S. 588, s. c. 71 L. Ed. 1219, is as well in point.

As late as March 27, 1933, the court had occasion to consider the importance to its own work of opinions from the lower courts. In *Public Service Commission of Wisconsin vs. Wisconsin Telephone Company,* No. 517, October, 1932, Advance Opinions, Law. Edition U. S. Supreme Court, p. 670, the court wrote:

> "We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court. While it is always desirable that an appellate court should be adequately advised of the basis of the determination of the court below, we have pointed out that it is particularly important that this basis should appear when the decree enjoins the enforcement of a state law or the action of state officials under that law. *Virginian Railway Co. vs. United States,* 272 U. S. 658, 675; *Lawrence vs. St. Louis-San Francisco Railway Co.,* 274 U. S. 588, 596; *Hammond vs. Schappi Bus Line,* 275 U. S. 164, 171, 172; *Railroad Commission vs. Maxcy,* 281 U. S. 82, 83. For then, the respect due to the state demands that the need for nullifying the action of its legislature or its executive officials be persuasively shown."

In *Missouri, K. & T. R. Co. vs. Elliott,* 184 U. S. 530, s. c. 46 L. Ed. 673, there was under debate whether and how the Kansas court had dealt with the question. This court said that the Kansas court had undoubtedly adopted a certain position about it, and then this:

> "We say this is undoubted, since the opinion of the Kansas City court of appeals recites that such was the contention, and the court proceeded to consider and decide it."

The court there put into exact statement our contention here. It accepted the recital of the trial court as to what, in that court, had been the contention of the parties. Can it accord less of faith to the recital, the recital repeated with emphasis and exactitude, that the litigants had asked action upon the December, 1926, date?

In *Thompson vs. Maxwell Land Grant Co.,* 168 U. S. 451, s. c. 42 L. Ed. 539, the court considered the usefulness and result of an opinion, made by law (as here) a

part of the record. Of the court's own opinions, it said that they might properly be examined to determine what matters were considered, and upon what grounds the judgment was entered. Then this:

> "Whenever a case comes from the highest court of a state for review, and by statute or the settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment."

The Fifth Circuit in *Rademaker vs. E. D. Flynn Export Company*, 17 Fed. (2d) 15, thus puts it:

> "We think such opinion (that of a trial court) may properly be examined by an appellate court for the purpose of ascertaining the grounds on which rulings in the course of a trial were made, and judgment entered. *Gross vs. United States Mortgage Company*, 108 U. S. 477, 496; *Adams County vs. Burlington R. R. Company*, 112 U. S. 123, 129; *Virginian Railway Co. vs. United States*, 272 U. S. 658."

In *San Jose L. & W. Co. vs. San Jose Ranch Co.*, 189 U. S. 177, s. c. 47 L. Ed. 765, this court remarked that it "appears from the opinion of the court that plaintiff relied" upon a certain act of Congress, and that "the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act." And then, making the opinion determinative of what occurred on the trial, this:

> "Under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff."

In the Fifth Circuit case the court expresses how it may ascertain from the opinion "the grounds on which rulings in the course of a trial were made"; and this court in the *Virginian* case said that "unless this court had that knowledge to be gained from an opinion of the grounds of the decision below, it is denied an important aid in the consideration of the case." And it is to be remembered and accentuated that the trial court, in its original opinion, stated that the date of December 31st, 1926, had been requested by both sides; and that when that opinion was challenged by a petition for modification, it more sharply, and more definitely, and more exactly, reasserted what it had thus said in its original opinion. Its mind was directly addressed to the subject, and it had no doubt upon the subject. It again recited that the parties had made the request "upon the hearing" for the date of December 31, 1926, and that "the court having acted upon such a request" it would stand by what it had done.

2. It will be recalled that the franchise contract is dated January 29, 1927; it will be reflected how nearly precedent to that time was December 31, 1926. It will be reflected how the company's valuation made up for rate purposes (see Kimball, Exhibit 4, Record, p. 112), was as of December 31, 1926. It will be reflected that the gas costs and other expenses in all of the tabular work appearing in the record addressed themselves primarily to that date. It will be reflected that beyond an extension by Mr. Kimball of certain figures on return to include the year 1927, there was no other period and no other date to which the proof was addressed. It will be reflected that there was no proof addressed to January 29, 1927,

nor to December 1, 1927, nor to October 9, 1929, the dates named in the assignment of errors. And from these reflections there flows, as there must flow, the conclusion not only that the Gas Company did not desire to address itself to any date other than December 31, 1926, but that it put into the record no proof upon other dates upon which might be predicated any rate base values, operating costs, expenses of operation and the like, all necessary prerequisites to the determination of a fair rate. So, it was natural that the parties litigant should have addressed their proof to the end of the year preceding the contract date by twenty-eight days as the proper time of measurement; and it was natural that they should have said to the court that they wanted a decision as upon that date.

3. The franchise itself forbids the possibility of a fixation of values, expenses and returns as upon different dates during the course of the litigation.

Let us look at the contract and to section 7 of it (Record, p. 34). That section of the contract provides how "after the expiration of two years from the date of the final determination of the rates and charges for natural gas," the same procedure as that from which this suit arises might again be started before the Railroad Commission on the instigation of either party. This, then, is the contract cycle: (a) the filing of a schedule by the company; (b) the hearing upon it before the commission; (c) the final fixation of the rate by that body; (d) and after two years a repetition of the cycle. Now, if appellant was right in its complaint that the trial court should have made its findings, in addition to those at the end of 1926, for the contract date of January, 1927, the

Owsley County gas date of December, 1927, and the commission decision date of October, 1929, one date after another during the progress of the hearing, it would not be restricted to its contract cycle, but would have its hearings multiplied many times over the contract provision, under conditions changing from day to day, under amended bills, under new proof addressed to the different days—and the protection which the city bargained for and got in its contract would be a wholly futile protection. The intent of the provision is obvious; and it is not to be read into the spirit of that contract and contrary to its plain intent that, as within these periodic fixations, there might be variations from day to day, and from time to time.

4. The fact that the appellant asks no fixation of values and rates as upon any day after the Commission's decision date of October, 1929, so far arouses a degree of mental curiosity as to cause us to speculate upon the underlying reason of the Gas Company. And speculating upon it, it is recalled how natural it would have been that the appellant, with faith in its insistence, should have urged it that the trial court should have made a decision as of the *date of its decree*, the autumn of 1932. In assignment of error III the appellant, indeed, complained that the trial court did not find, but should have found, the rate base value as of the date of the court's decree (September, 1932). But in its brief that date is forgotten. The appellant asked of the trial court, and in fact obtained, a *de novo* consideration of the entire matter at the court's hands; and if the court had the right to hear it originally, and to adopt its own conclusions, rather than those of the Commission, would it not be

expected naturally that the Gas Company should insist in its brief, as it does in its assignment of error, that the trial court's findings should cover also September, 1932, the date of its findings? And we wonder whether this had anything to do with it? In 1929, more precisely in October, 1929, materials, and labor, and the cost of everything bought and to be bought with money which went into the reproduction values of the Gas Company, which went into its annual expenses, which entered in, and in every particular into, a finding as of that date, were at their peak of prices. And then came the depression; and depression upon depression. And in the autumn of 1932, when the trial court decided the case, the cost of material and labor and everything that went into the rate base values and annual expenses of the company were cut perhaps near half in two. And everything with which the Company had to do in its relation to Lexington was cheapened for it—everything that had to do with this controversy, save the price at which it was selling gas to Lexington. The subject was in appellant's mind. Its brief says that "there was no economic depression in this country in February, 1927." It might with equal precision have said that there was none until near the end of 1929. The appellant employs public knowledge and judicial notice as the basis of the statement. It is a matter of common knowledge and judicial notice that until October, 1929, all commodity, all labor, all financing and material prices were high. It is equally the subject of such knowledge, general and judicial, that since October, 1929, the price trend has been steadily downward to the extreme low of the autumn of 1932, and on to the present. The high current prices as manifested

in the engineering set-up in this case were the natural result of the free-play of the gambling mania of the times, the pushing of enterprise beyond anything that was normal or healthy, cars for everybody, steel for their construction, unprecedented activity in the building trades, labor asking and taking its own highest prices. The low prices of the autumn of 1932, and of this day, sharply contrast the spirit of October, 1929, and the years preceding it. If the appellant is entitled in this record to a decision of a day other than that of December 31 1926, to which the entire record addresses itself, then upon its own theory of the case, and its own assignment of error, its other day should be that October day in 1932, when at its instance the trial court decided the case on its own conceptions of values, expenses, amortization, and the like. And if it be said that there was no proof in the record addressed directly to this date, so also it is to be said that there is no proof in the record addressed to January 28, 1927, and no proof in the record addressed to December 1, 1927, and no proof in the record addressed to October, 1929. And as well it may be said that when the trial court came on to consider the matter and to decide it, it had a means of knowledge peculiarly its own. It had the right (if it had the right to adopt any other day than that which, according to its own opinion, the parties had invited it to adopt) to exercise its own knowledge, its own current information gathered from the press, from the contact of its members with the banks, and business men, about the unemployed labor, the idle cars, the tremendous recession in the values of the stocks of sound and seasoned corporations engaged in the great industries of the country, the rails, the steels, the motors, the coals, the oils, and others. The

court had the right to apply its own knowledge, its judicial knowledge, the knowledge not only that it might chance to have acquired in the ordinary run of intelligent minds abreast of current affairs, but such as it might obtain upon direct and current inquiry. The brief for the appellant concedes that the court may take judicial knowledge of a fact of geography, the (alleged) proximity of Lexington to the coal fields, and of a matter of commerce, the "keen competition" between gas and coal. It will not deny, therefore, it would seem, the propriety of utilizing the doctrine of judicial notice here. The authorities are clear:

The Bank of Kentucky vs. The Adams Express Company, 93 U. S. 174, s. c. 23 L. Ed. 872. Here the court succinctly put it thus:

> "We cannot close our eyes to the well known course of business in the country."

Nicol vs. Ames, 173 U. S. 509, s. c. 43 L. Ed. 786. The court thus expressed the same idea in these words:

> "We have the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country."

Banton vs. Belt Line Ry. Corporation, 268 U. S. 413, s. c. 69 Law. Ed. 1020. This is a rate case. It is directly in point. The court said as of direct application here:

> "It is well known, and the court will take judicial notice of the fact, that the purchasing power of money has been much less since 1917 than it was in 1912, when the order was made; and that the cost of labor, materials, and supplies necessary for the proper operation and maintenance of street railways has greatly increased."

Of course, it follows that the court will take judicial notice as well of the converse condition, that the cost of labor, materials and supplies is now greatly reduced since the proof was taken herein.

Simpson vs. The United States, 252 U. S. 547, s. c. 64 L. Ed. 709. Here the court said that it would take judicial notice of what was the fair value, or earning power, of money safely invested.

Lincoln Gas & Electric Light Company vs. City of Lincoln, 250 U. S. 256, s. c. 63 L. Ed. 968. Here the court took judicial knowledge of World War increases in "the costs of labor and supplies of every kind."

The same law might be extended indefinitely; but it does not seem worth while to go on with so obvious an argument.

Professor Thayer in his "Preliminary Treatise on Evidence" says of judicial notice that "it is an instrument of great capacity in the hands of a competent judge, and it is not nearly as much used in the region of practice and evidence as it should be. * * * The failure to exercise it tends daily to smother trials with technicalities, and monstrously lengthens them out."

Upon the subject of the acquisition by the court of the facts which might be the subject of judicial notice:

It is not to be thought that the members of the trial court were to be restricted, in the application of judicial notice, to the generality of public knowledge upon the subject under consideration. Thus, while the courts may take judicial knowledge of the ebb and flow of the tides, of the periods of the moon, of the confluence of rivers, of maps and calendars, and the like, there is always *ex necessitu* occasion for the sitting judge, or judges, to

look to the tidal reports, the phases of the moon in the calendars, the geography of the land, and the like, in order that they may have knowledge to make worth while and of real value its application.

Jones vs. United States, 137 U. S. 202, s. c. 34 Law. Ed. 691. The court here thus broadly laid its own concept of how ever open to it were all channels which it might consider reliable. It wrote:

> "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. * * * Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. * * * As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State."

Brown et al. vs. Pieper, 91 U. S. 37, s. c. 23 Law. Ed. 200. This opinion says:

> "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he deems safe and proper."

The experiences of the trial judges had fitted them to weigh these reflections and these values. They were permitted to inform themselves from their own reliable selections of sources of information. And had the appellant requested of the court a fixation of values and

of expenses and of rates of return as of the time when the court decided the matter, it must have met and experienced a result much unhappier to it than that which flows from the adoption by the court of the date, the end of 1926, the end of the year, just twenty-eight days before the making of the franchise contract, the date to which the court said it was invited to address itself, that date to which the record addressed itself in wholly largest part.

5. Since the preparation of the foregoing, stimulated by appellant's flat statement outside of the record, that it had not asked a fixation as of December 31st, 1926, it occurred to us to search our memories, and all that had transpired in the prolonged history of this case, for something that might put at rest this undesirable contradiction between the trial court and opposing counsel. We were disinclined to put in our own statement of the happenings at the oral hearing, notwithstanding that the direct statement of counsel that they did not request the December, 1926, date should leave us ethically free to recount the events as we remembered them. We find, we think, effective settlement of the contradiction; and we find, we think, full support of what the court said. On page 16 of the record, in the bill in the instant case, twice appears this:

> "December 31, 1926 (the date certain in this case)."

Again, at page 24 of the record, the bill charges that the act of the Railroad Commission in fixing the rate for any date prior to the effective date of the contract was void, from which there is the natural deduction that what

was in the appellant's mind was that a fixation as of the contract date would have met its approval. But the appellant has made its position yet more definite.

This oral hearing was in March, 1932. More than two years prior to that hearing the Gas Company filed its brief before the three-judge court. Naturally that brief was before the court when it came to consider the matter finally before the handing down of its opinion in the summer of 1932. Reverting to that brief, we find in it, at pages 65, 66 and 67, this:

> "While we submit that it is clear enough that the parties intended the court should as between them decide not merely the federal question as to whether the Commission rate was confiscatory, or invalid on any other ground, but should also ascertain and fix just and reasonable rates; it is equally clear that they understood *such court fixation should be as of the date of the contract,* and not a legislative fixation of rates for the future, since by Section 7 the parties have themselves determined how long such rates should be binding on them, before either could move for a modification. *We therefore contend that the ascertainment of just and reasonable rates and charges by the court as of the contract date becomes a judicial decision of a just and reasonable charge for a past service, and not a legislative fixation of rates for a future service.*
>
> As further bearing on this question we desire to direct the attention of the court to the fact that both parties have by common consent adopted December 31, 1926, as the date on which the value of the used and useful property should be ascertained, that being the nearest convenient and practicable date to the contract date, and the valuation date to be adopted by the court must be of the same date and not the date of the judicial inquiry.

> Again, *it is inherently necessary that the just and reasonable rates and charges must be as of the contract date,* because the right of the company to just and reasonable rates and charges begins with the beginning of the service. The impoundment began at the same time, and we now have in *custodia legis* a fund, the right to which is to be determined by the just and reasonable rates for the service on account of which the impounded money was collected. We therefore submit that the court, having custody of a fund claimed by both parties, must, in order to distribute that fund, decide to whom it belongs, and that as a necessary prerequisite the court must first determine the just and reasonable rates as of the contract date. * * * The court did not order this impounded money to be paid in, and the court can not award it to anyone without deciding to whom it belongs, and as already stated, such decision can not in the nature of things be rendered without first fixing the just and reasonable rates for the service rendered as of the date of the contract, for it is on that predicate, and that alone, that the ownership of the fund can be determined."

There is an issue of memory between the trial court and opposing counsel. The high-grade and excellent lawyers who wrote that brief are the same as those appearing on the Gas Company's instant brief. An original of the imprinting of that brief is filed as an appendix hereto. It is very certain that, their memories being recalled to what they wrote more than three years ago, they will be the first to welcome the light that their former brief may shed upon the matter.

So upon these five grounds it is submitted that the trial court rightly took December 31, 1926, as the date

from which it should view the controversy. It is submitted as well that the appellant is in error when it urges in its instant brief that there was presented to the trial court for decision, either

"(1) The rate base *as of the contract date, and for the period from that date to the date of the Commission order* (The Gas Company's italics), or

(2) The rate of return, for the same period."

That a party may not thereafter alter a position taken by him in a legal proceeding needs neither argument nor authority. The estoppel thus worked is stated succinctly in *Davis vs. Wakelee,* 156 U. S. 680, s. c. 39 L. Ed. 578.

VI

Upon (b), *supra,* the fact that the trial court did not include the Owsley County 40-cent gas; some ten months after the making of the franchise contract the Gas Company began to serve to its patrons, as a part of their consumption, certain gas from Owsley County, Ky., turned into the lines under a contract of date subsequent to the franchise contract, made between the appellant company and the Petroleum Exploration, the concern which owned this Owsley County gas. For this gas the appellant contracted to pay 40 cents per thousand. The Gas Company charges error in the failure of the trial court to include in its calculation the cost of that gas. The court below, in its response to the petition for modification (Record, p. 90), remarks how the Gas Company "did not begin taking gas under this contract until November of 1927," and how, therefore, it could not enter

into a computation rested upon December 31st, 1926. Passing for the time their full right to rest upon the date of December 31st, 1926, as rightly determinative of the matter, the appellees, in full duty to their case, extend this discussion to throw light upon the fairness of the results reached by the Commission below, even if this Owsley County gas be included. And upon this we present the orderly sequence of conditions:

On December 31, 1926, ended the last round full year before the making of the franchise contract. So to that date naturally were addressed proofs of values, costs and the like.

On January 28, 1927, the franchise contract was adopted.

On February 26, 1927, there was filed the complaint before the Railroad Commission, the proceeding out of which the present suit arose.

On March 24th, 1927, the Central Kentucky contracted with the Petroleum Exploration for the Owsley County gas (Record, p. 178). The contract evidencing the purchase first appeared a year or so later, when the case was under preparation. It was a condition subsequent. The city had no voice in its terms or long duration.

In late November, 1927, the Owsley County gas began to be supplied, a condition subsequent.

In November, 1927 (Record, p. 208), the Columbia Gas and Electric Corporation, a subsidiary of which, the United Fuel Gas Company, was selling gas to the Central Kentucky at a high price, bought the Central Kentucky. This, too, was a condition subsequent.

So at the identical time when the high priced Owsley County gas came in, the high priced United Fuel gas went out.

So when the Owsley County gas came in, the other chief source of supply of the appellant company was from the United Fuel Gas Company; and the United Fuel Gas Company (Record, p. 175) was an one hundred per cent subsidiary of, and an integral part of, the Columbia Gas and Electric Corporation; and the Central Kentucky Company, the appellant, to the extent of 5995/6000, was a subsidiary of, and an integral part of, the Columbia Gas and Electric Corporation; and the Central Kentucky Company in buying from the United Fuel Company, was buying from itself, and the United Fuel Company in selling to the Central Kentucky Company was selling to itself; and this court in a late Kentucky natural gas case, *The United Fuel Gas Company vs. Railroad Commission of Kentucky*, 278 U. S. 300, s. c. 73 L. Ed. 390, wrote this:

> "We need not labor the point that a public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary, or a corporation owned by its stockholders."

Reflecting about what is fair, the question is put whether if the December 31st, 1926, status is to be disregarded as on account of the Owsley County gas, the price here to the citizens of Lexington is to be boosted for the some seven years of this litigation upon the fiction of what the Central Kentucky Company had to pay to the commonly owned United Fuel Company during a

portion only of the first year of the seven years. There can be but one answer.

If, upon the contrary, the case is to be considered as appellant would now have it (and in complete reversal of its former position, as reiterated by the trial court) in the light of subsequent conditions, and if the rate is to be affected by conditions that came into being after that time, if the appellant is to get any benefit that might accrue to it out of consideration of the Owsley County gas, it must as well accept the other changed condition, the complete unity of the United Fuel and Central Kentucky companies, effective in the very same month (December, 1927) that the Owsley County gas was turned into the lines. A case pertinent has recently enlisted the attention of the court, that of *Western Distributing Company vs. Public Service Commission of Kansas*, 285 U. S. 119, s. c. 76 L. Ed. 655. The case will well repay reading. The gas company there went before the commission with an application for higher rates. It developed on the hearing that, when the old rates complained of were established, the distributing company and the producing companies were distinct entities, and that the gas bought and sold between them was at forty cents per M. c. f. Afterward the two companies came under common ownership. In view of this fact, the commission insisted that, in order to determine the reasonableness of the requested increase, inquiry must be made as to the propriety of the forty-cent wholesale rate. The company declined to make any showing with respect thereto, because (it claimed) the commission was bound to accept the inter-company rate as a proper element of cost in fixing the retail sale. The commission thereupon dismissed

the application for an increase; and the matter came into the courts. The District Court dismissed the bill, and the case came here. Here this was written:

> "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the cost which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

This Kansas case received the attention of the trial court in the instant case. It believed its doctrine to be inapplicable here because (Record, p. 85) inasmuch as

the court here was "asked to fix the rate base and determine the income as of December 31st, 1926, we are of opinion that for such purposes we should accept the contract price of gas purchased from the United Fuel as part of the cost of operation." It remarked (Record p. 85) that as of the date selected by the litigants "the United Fuel and the Central Kentucky Natural Gas Company had no relation to each other by reason of common ownership of stock at that time." It is obvious enough that had the court been dealing with, been asked to deal with, rate bases and gas costs as of a date *after* the affiliation of the two companies, it would have taken stock of, and have excluded, the high priced intersubsidiary gas; and as upon appellant's request for a later date of its own selection, we may well surmise that it would have written, as this court wrote further in this Kansas case, this:

> "All of these facts * * * would be more persuasive with respect to the propriety of the rate if the parties were independent of each other and dealing at arm's length. Where, however, they constitute but a single interest and involve embarkation of the total capital in what is in effect one enterprise, the element of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based theory can be satisfactorily answered."

Smith vs. Illinois Bell Telephone Co., 282 U. S. 133, s. c. 75 L. Ed. 255, is in point as well.

The Right of the Whole Matter

Computations in appellant's brief, even upon its own theories, are not satisfactory. They rest upon surmise and estimate. They produce figure upon figure of how the result might be altered if the weather were this or that, and if the consumption went down as the price went up. Would it not be fairer to adhere to the actual record facts? Let us, out of this turmoil of figures, see whether we cannot get down to something that the practical minds of practical men may accept. Let us discard for the time the sundry estimates and the sundry theories of the experts. Let us get away from the Columbia's purchase price; for it is submitted that the price paid for the property by the Columbia was high. There was a very good reason for the Columbia to pay high. In the first place, there was the urge of that element, the desire of the large utility interests, for complete and exclusive control in the territories where they might be dominant. In the second place, there was another bait, an invitation for the payment of large price, the gambling instinct to take a chance inherent in most men, the chance being in that near million dollars of impounded funds that awaits the determination of this litigation. Let us see whether we can go to any basis in the entire record that is devoid of theory, and devoid of everything but ascertained fact.

Let us go to Mr. Jirgal's work. He tells us what he did. It is worth while to understand what he did. At page 228 of the record he says that he "went to the books of the Central Kentucky Natural Gas Company and to the books of the Lexington Utilities Company"; that from them he ascertained all costs; and that, in sub-

stance, then he had adjusted his figures (Record, p. 229) to "the actual cost expressed in 1926 dollars," and then this:

> "Q. In the ascertainment of the value in your Exhibit No. 1, the assessment was based upon fact or theory? A. On facts.
> Q. Gotten again where? A. Gotten from the records of the company."

So let us get a rate base as upon Mr. Jirgal's actualities. We go to the opinion for this information. It says (Record, p. 83) that Jirgal found the historic cost of the entire plant to be $2,653,035.00; and that allocating to Lexington its 55.1 per cent (Record, p. 83) left the values, the actual ascertained values from the Company's own books, as evaluated upon 1926 conditions to be for Lexington $1,461,822.00.

Then, while the opinion does not manifest it, Mr. Jirgal's own work does manifest it. At page 229 of the record he says that the "adjusted cost of the Lexington Utilities Company's property as of December 31, 1926," was $383,152.00. Let us add these two sums:

Jirgal's ascertainment of the Lexington values of the appellant company	$1,461,822.00
Jirgal's actual values of the Lexington Utilities property	383,152.00
Total actuality as adjusted to 1926 conditions	$1,844,974.00

Now Mr. Jirgal further explains (Record, p. 229) how "these figures manifest nothing of depreciation; they are as the property would stand today, without anything having been taken off for depreciation." So we depreciate them; and utilizing the figure of depre-

ciation, that of 9.4 per cent, to which the company cannot object, since that is its own claim (Record, p. 222), we get a depreciation of $173,427.00; so Jirgal's actuality of values, depreciated according to the per cent employed by the company, is thus:

Jirgal's historic cost of both properties	$1,844,974.00
Less 9.4% depreciation	173,427.00
The actual cost as upon 1926 conditions	$1,671,547.00

To that rate base then, the only one free and clear of all conjecture, the only one unhampered by market conditions, we turn as a sure guide, and applying the figures to the year 1926, we get *definite and exact record,* and not estimated, *results.* We bring down these actual results from Mr. Kimball's (the company's) table at record page 116a, save that from the sales shown there of $652,509.00 at 50 cents, we deduct 5 cents per M. c. f. from the sale price to get down to the 45-cent rate of the Commission. This deduction equals 1/10, or $65,250.00. So we have:

Sales for 1926 at 50c	$652,509.00
Less 5c per M. c. f.	65,250.00
1926 sales at Lexington at 45c	$587,259.00
To which, for total income, we add (see the same company table) these additional income items:	
Gasoline	$ 6,339.00
Shop	4,471.00
Interest	836.00
Miscellaneous	375.00
Total income, 1926, gas sold at the Commission's 45c rate	$599,280,00

Then we go to that same table (Record, p. 116a, last column) for the outgo in the same year, as per the trial court's system of itemizing, and as per the company's own manifestation. We find these items, last column, page 116a:

Field and main line expense	$ 27,539.00
City plant expense	42,621.00
General expense	18,954.00
Gas purchased (see post)	238,133.00
Taxes	40,155.00
Total actual expense	$367,402.00
To this we add the court's estimates (and since the items are of amortization and the like, there can be no actuality to employ):	
For amortization, the company	50,000.00
For amortization, the Lexington Utilities Co.	10,263.00
Extraordinary maintenance of company's property	10,000.00
Do. of Lexington Utilities property	5,000.00
Total actual outlay, plus the trial court's amortization, etc., allowances	$442,665.00
So we come down to results:	
Income, actual, on 45c rate	$599,280.00
Actual expense, plus estimated amortization	442,665.00
Net for return	$156,615.00

Now Kimball's actual value for both properties, as depreciated upon the company's 9.4 per cent condition, is $1,671,547.00; and upon this the return in dollars, just arrived at, of $156,615.00, is 9.4 per cent.

This calculation, again it is emphasized, has gone to the actualities, book figures themselves, for every single figure used in the calculations, except the estimatory ones of amortization and extraordinary annual upkeep. Some three observations, however, may be made with regard to it:

(a) The gas costs of $238,133.00 are taken from a table of Mr. Kimball's, at page 120 of the record, by taking the average mean between the 40-cent and 50-cent selling rate costs ($219,259 cost at 40c selling rate, plus $257,007 cost at 50c selling rate, divided by 2 for the 45c selling rate costs, equals $238,133.00).

(b) The computation includes the trial court's allowances of amortization costs of $50,000.00 for the company, and $10,263.00 for the Lexington Utilities, on nothing more substantial than the unsupported estimate of Mr. Kimball, a total of $60,263.00 per annum, for which there is no sort of record justification, a statement to be elaborated hereafter. And $60,000.00 is in itself an income of around 3.75 per cent upon the Jirgal value of $1,671,547.00; and the 9.4 per cent, just arrived at, and 3.75 per cent, the increase if the guessed-at amortization figures be excluded, make a total of 13.15 per cent.

(c) In going to this actuality we have not taken in the theoretical intangibles. We now do so. As fixed by Mr. Kimball, they amount to $252,000.00 (Record, p. 236). If they were to be added to the Jirgal rate base of $1,671,547.00, we would have a total rate base, Jirgal's actualities, plus the company's self-fixed intangibles, of $1,923,547.00. The return just ascertained of $156,615.00 is a return of 8.1 per cent upon this total of $1,923,547.00.

Suppose, on top of these actualities, we take the appellant at its extremest position, and extend these actual results to include the Owsley County 40-cent gas:

(a) In 1926 there was sold at Lexington 1,303,000 M. c. f.

(b) Lexington's allocation, 55 per cent, of the Owsley County contract quantity of 750,000 M. c. f. is 412,500 M. c. f.

(c) 412,000 deducted from the total of 1,303,000 M. c. f., leaves 809,500 M. c. f. from sources other than Owsley County.

(d) Adhering to the right demanded by an instinctive sense that if the Owsley County gas of December, 1927, is to come in, the intersubsidiary United Fuel premerger contract price must go out, we go to Mr. Kimball's table of gas costs, other than that of the United Fuel, at page 118a of the record, thus:

Year	Total Feet Bought	United Fuel	Net Bought
1922	2,857,999	1,501,323	1,356,676
1923	2,570,664	1,535,583	1,035,081
1924	2,700,197	1,198,486	1,501,711
1925	2,876,879	940,507	1,936,372
1926	2,607,861	955,126	1,652,735

Total feet bought other than United Fuel 7,482,575

And again:

Year	Total Dollars Paid	Paid United Fuel	Net Dollars
1922	$406,650	$260,247	$146,403
1923	419,661	307,116	112,545
1924	430,299	239,697	190,602
1925	484,814	188,101	296,713
1926	432,701	191,025	241,676

Dollars paid less United Fuel $987,939

We then have only to divide the $987,939 by 7,482,575 feet to ascertain the five-year average cost per thousand paid by the Central Kentucky to have been 13.2 cents.

Then the calculation of gas costs for 1926, counting in the Owsley County gas, and counting all other gas at this 13.2 of actuality, results as follows:

412,500 M. c. f. from Owsley County at 40c	$165,000.00
890,500 M. c. f., the remainder, at 13.2c	117,546.00
Total gas costs	$282,546.00
Less gas costs as they actually were (see *supra*) as on December 31, 1926, *supra*	238,133.00
Excess of cost including Owsley gas	$ 44,413.00
Then to get net income for 1926, we must, from the actual ascertained revenue of	$156,615.00
deduct this extra gas cost of	44,413.00
leaving net revenue of	$112,202.00

Now 7 per cent on $1,671,547.00, the Jirgal actuality of value, is $117,008.00, only some $4,846.00 in excess of the $112,202.00 just arrived at by counting in the Owsley County gas—that very thing that the three judges said, and upon challenge, repeated, that they were asked not to do. And this inconsiderable $4,846.00 is not much of a drain upon the upsupported $60,000.00 plus, of amortization charges taken stock of in this calculation.

In the face of these figures, is the court prepared to say that there should be injunction against the Commission's rate of 45 cents, when it approaches a solution of the case in that temper of mind that it expressed in the

San Diego L. & T. Company and *Knoxville Water* cases, elsewhere cited herein, in these words?

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

And, it is submitted, therefore, that if this court should measure the case *de novo*, if it should decline to restrict its hearing to the question of meretricious and arbitrary action, it must find itself circumstanced by these actualities in favor of the fairness of the rate order of 45 cents of the Commission, left effective by the trial court. And considering the nature of appellant's speculative proof, as measured by these actualities, we have felt the impelling force of what one of the supreme court justices has said in balancing the effect of testimony. He wrote that proof implies persuasion; that to compel the human mind to infer in any respect that which observation and logic tell the human mind is not true, interferes with the process of reasoning; and that it would be a departure from the unbroken practice to require an artificial legal conviction where no real conviction exists. And it is our conclusion that the court, in reading this record, can, in the application of its reasoning faculties, be subjected to no conviction that the 45-cent rate is confiscatory of appellant's propeity.

VII

While the foregoing calculation has rested upon the company's own manifestation of gas cost, there is something more to be said upon the subject. The Company Exhibit 4, Sheet 14 (Record, p. 118a), manifests that all of the gas purchased by it was at 10 cents per M. c. f., save from the following producers, and at the following prices, to-wit:

United Fuel Gas	20 cents
Kentucky Cities Gas Company	17.5 cents
Bed Rock Petroleum	12 cents
Petroleum Export Company	15 cents
Hillsdale Gas Company	20 cents
Lewis Vincent	20 cents

These figures, for illustrative purposes, are based upon gas sales at 40 cents. The cost under two or three of the contracts would be somewhat higher if the sale price were at 50 cents; but the figures given will suffice for what we have in mind, and that is this: the contracts under which was purchased the gas supply from these just named producers are in the record. We treat of them separately:

(a) The United Fuel Gas Company: Throughout all, save the first few months of the time covered by this litigation, the United Fuel Gas Company and the Central Kentucky Company, by virtue of their common ownership by the Columbia, were a unit. They were one and the same. The transfer of gas from one to the other was a transfer from self to self. And the money paid from one to the other, was money paid from self to self. And while it is reiteration, it is again emphasized how, all

other considerations laid aside, it is spiritually unfair for the company to sell its gas at Lexington at a price elevated on any such specious theory as that of resting it upon a supposed purchase and sale price between one and the same owner.

(b) The Kentucky Cities Gas Company: If we turn to the record at page 242, we find that this contract was cancelled before the Owsley County gas came in.

(c) The Bed Rock Petroleum: The contract for this gas (Record, p. 243) calls for 8 cents per M. c. f. At one time it seems to have been raised voluntarily to 12 cents. The record does not disclose which is correct.

(d) The Petroleum Export Company: The Gas Company, though asked to put into the record all of its gas purchasing contracts, did not put in any Petroleum *Export* Company contract; and if it be a typographical error for Petroleum *Exploration,* that is the Owsley County contract for the 40-cent gas, taken care of elsewhere in this discussion.

(e) The Hillsdale Gas Company: We find (Record, p. 244) that this contract calls for 720,000,000 feet per annum, and that as a matter of fact, and in the very second year, 1926, of supply under it, the production amounted to only 560,000,000 feet; and we find that there was a provision in this contract affording the Central Kentucky Company the right to cancel it whenever the supply should fall below 500,000 feet per day in the winter.

(f) The Lewis Vincent: Under the terms of this contract (Record, p. 246) the Central Kentucky Company is not required to take the gas for any longer

period than that company "in its judgment" finds it profitable to take the gas.

The result of this scansion of the terms of the gas purchase contracts is that the Central Kentucky was bound by contract to take not a foot of gas at above 10 cents per M. c. f. from any person or company save the Petroleum Exploration for the Owsley County gas, and possibly the Hillsdale Company; and buying gas elsewhere at 10 cents, and having to pay not in excess of 10 cents for any gas save the Owsley County and possibly the Hillsdale, it is fair that the calculation above named be further revamped, and that the price of 13.2 cents arrived at for all gas other than the Owsley County gas, should be supplanted by the more accurate and just cost figure of 10 cents per M. c. f. Upon that basis the figure of $117,546.00, shown above, would be reduced to $89,-050.00; and the cost of gas, upon the theory of including the Owsley County gas at 40 cents, and all other gas at the thus established price of 10 cents, would be $254,-050.00 in place of $282,546.00; and this with the further result that the counting in of the Owsley County gas as opposed to the December 31, 1926, conditions, would be at a disadvantage to the Gas Company of some $28,496.00 per annum ($282,546.00 minus $254,050.00 equals $28,-496.00).

VIII

The trial court, substituting its own conclusions for those of the Commission, conceived it that a rate of fifty cents was adequate. It offered the Gas Company the benefit of that rate, and to enjoin the forty-five cents

fixed by the Commission, conditioned that the company would accept the fifty cents as a finality, and thus end this particular hearing. The company declined the proffer; and the court declined to enjoin the Commission's rate. Of that action the Gas Company complains. Two reasons, one of equity, and one of fact, support the action of the court, (a) the legal one in the court's right to demand equity of the suitor, as a condition to granting equity, and (b) the one of fact that the court allowed an annual amortization charge of fifty thousand dollars, unsupported by the record. These two bases for the decree are discussed under the next succeeding two heads.

IX

The equitable basis, of course, for the court's action is to be found in the maxim that he who seeks equity must do equity. The maxim, as stated by Pomeroy (Equity Jurisprudence, Section 385), is rested upon settled juridical notions of morality, and upon conscience and good faith. Said the writer:

> "The court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit."

The exact application of the maxim here was, in the court's view, that fifty cents was enough; that any less would be not enough, and that any more would be too much; and the court's opinion and decree worked out a calculation arriving at that result. It knew that the litigation had been pending many years; it knew of the impoundment feature; and it knew how many dollars were tied up, useless to those who might be entitled to the money. It knew how desirable it was to have the fund distributed in these needy times. And it said to the Gas Company that the court would give it the benefit of the fifty cents, if the Gas Company would do equity and accept the fifty cents. This, it is submitted, the court had the right to do. Under the authorities it particularly is within the province of courts of equity to grant injunctions on condition. The doctrine has had a widespread application. It has been applied, *inter alia*, in rate cases. We cite the following:

1. *Public Service Railway Co. vs. Board*, 276 Fed. 979, 990, a three-judge case from New Jersey. The court wrote:

> "Anticipating that the court might name a new rate as a condition of an injunction against the old one, counsel for the board have quite pertinently called the court's attention to the fact that it is not a rate-making body and have made the point that if the court name a rate as a condition for granting an injunction, it would, in effect, fix a new rate and would thereby exceed its function. That it would exceed its function as a rate-making body is very true, because not being such a body, it has no such function. But that in so doing it would exceed its power as a court of equity is not true. Injunction is one of the equitable remedies

over which the court has jurisdiction. The remedy of injunction may be granted in the terms of the prayer or it may be granted only upon condition that the party seeking equity shall do equity, as in this instance, that the company shall consent to charge a fare no greater than what the court deems necessary to avoid confiscation. If the naming of a condition is in effect the fixing of a rate, the sanction for the court's act is in the injunction and in the circumstances that make injunction imperative. This rule is ancient and of wide application. *Walden vs. Bodley,* 14 Pet. 156, 164, 10 L. Ed. 398; *State R. R. Tax Cases,* 92 U. S. 575, 23 L. Ed. 663; *Cummings vs. National Bank,* 101 U. S. 153, 25 L. Ed. 903; *People's National Bank vs. Marye,* 191 U. S. 272, 282-288, 24 Sup. Ct. 68, 45 L. Ed. 180; *Amarillo vs. Southwestern T. & T. Co.,* 253 Fed. 638, 165 C. C. A. 264; *Toledo vs. Toledo R. & L. Co.,* 259 Fed. 450, 458, 170 C. C. A. 426; *Consolidated Gas Co. vs. Newton,* (D. C.) 267 Fed. 231, 273, 274."

2. *City of Toledo vs. Toledo Railway & Light Co.,* 259 Fed. 450, 458, C. C. A., Sixth Cir. before Judges Warrington, Knappen and Denison. The court wrote:

"It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its order conditional upon the doing of equity by plaintiff to consent to charge no more than what seems to the court to be reasonable."

3. *Consolidated Gas Co. vs. Newton,* 267 Fed. 231, D. C., S. D., N. Y. Here Judge Learned Hand (page 274) wrote:

"There is no doubt that, viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years."

4. *Newton vs. Consolidated Gas Co.*, 258 U. S. 165, s. c. 86 L. Ed. 538. Here on appeal from Judge Hand's decree, just above, the Supreme Court said that it was within Judge Hand's discretion to grant the injunction upon terms.

5. *Kinney Coastal Oil Co. vs. Kieffer*, 277 U. S. 488, s. c. 72 L. Ed. 961. Here the court said:

> "It is a general rule that a court of equity, in a suit of which it has and takes cognizance, may administer complete relief between the parties, even though this involves the determination of legal rights which otherwise would not be within the range of its authority. And under that rule a court of equity, in awarding relief to one party, may impose conditions protecting and giving effect to correlative rights of the other."

6. *Holden Land and Live Stock Co. vs. Interstate Trading Co. et al.*, 233 U. S. 536, s. c. 58 L. Ed. 1083. This is an interesting case, and an interesting application of the maxim. It originated in the State Court of Kansas. The state court rendered a decree quieting the plaintiff's title to certain lands, provided the beneficiary of the decree would pay over certain moneys, controverted in amount, but definitely fixed by the Kansas court. From this conditional decree the case came up to this court by writ of error. This court dismissed the writ, in these words:

> "The judgment thus rests upon an independent or non-federal ground which was adequate to sustain it. The court applied a familiar equitable principle in defining the basis upon which extraordinary aid would be given. 'A court of equity is not positively bound to interfere in such cases by an active exertion of its powers; but it has a dis-

> cretion on the subject, and may prescribe the terms of its interference.' Story, Eq. Jur., Sec. 301; *Fanning vs. Dunham*, 5 Johns. Ch. 122, 142, 143, 9 Am. Dec. 283; *Tiffany vs. Boatman's Sav. Inst.*, 18 Wall. 375, 385, 21 L. Ed. 868, 879. It is manifest that the plaintiffs were not proceeding by virtue of any federal right in seeking to have the conveyances which had been executed in the form of absolute transfers of title declared to be mortgages; and it was competent for the court whose intervention was desired for this purpose, to demand that its conscience be satisfied by the doing of equity on the part of those who asked it."

7. *Lasswell Land and Lumber Co. vs. Lee Wilson & Co.*, (C. C. A. Eighth Circuit), 236 Fed. 322. Here the circuit judge writing expressed himself with concise illumination. He wrote:

> "The rule is universal that he who seeks equity must do equity. Much more, in our opinion, is it true that an applicant for equitable relief must submit himself to the requirement to do equity."

There are many additional cases. It is believed that those cited and quoted from are sufficient to make patent the broad range of the subject. The trial court took the matter by its four corners; and after applying its own faculties to the record, it reached the conclusion that fifty cents would be a fair rate. We may very well speculate upon what was in the mind of the court when it wrote the condition. We can reflect with it about the long period covered by the litigation. We can consider with it how the Gas Company had its right to begin all over again, every two or three years. We can feel with it the hardship of the continued retention of the funds impounded under the contract through the five or six

years of this controversy. We can comprehend its spirit; and we can understand how believing fifty cents to be fair, and how being asked to override the conclusions of Kentucky's due process rate-making body, it had the moral and legal right, working through the record, and concluding that fifty cents was fair, to grant to the Gas Company something of what it asked, and to exact of the Gas Company the equity that the court found to be fair. And if this court, in the face of the authorities, *supra*, finds itself at liberty to apply its own reasoning and own conclusions, for those of Kentucky's due process body, the Railroad Commission, and if it should see fit to set aside the decree, it is thought and submitted that it must be set aside, not upon any want of authority in the trial court to impose the condition exacting equity, but upon this court's original ascertainment, from its own application of its own faculties to the testimony, that the trial court erred to the detriment of the Gas Company in finding fifty cents to be a sufficient rate. And upon this thought we go back to what has been said before, *i. e.*, that when once a duly constituted hearing body has afforded due process in a rate hearing (and the bill of the Gas Company says in so many words that it had such a hearing), the courts have not the right to substitute their own views, their own conclusions, and their own deciding faculties, to the case heard by the Commission, until and unless the courts have first gone into the record and found that the hearing was not a hearing, that the decision was not a decision, and that the result came out of a meretricious disregard of the record.

X

Reverting again to our right under *Langnes vs. Green, supra,* to stand upon the decree of the trial court, but to reach the decree's results through a journey of reasoning different from that followed by the trial court: We submit that the trial court allowed an annual amortization charge of $50,000.00 without any record reason back of the item. We first pause to demonstrate, as a matter of mathematics, the effect upon the decree, if this annual charge be omitted. As heretofore demonstrated, there were sold in the Lexington district in 1926, 1,300,000 M. c. f. of gas. Fifty thousand ($50,000.00) dollars are equal, practically, to four cents per M. c. f. upon this amount of sales. Other years in the record demonstrate the sale of a lesser amount of gas; and for them the difference would approach nearly five cents per M. c. f. But taking the year 1926 alone, the elimination of this single amortization charge of $50,000.00, or four cents per M. c. f. for the gas, would reduce the trial court's ascertainment, without more, to a fair rate of forty-six cents per M. c. f. for the gas. With the mathematical effect thus visualized, we come to consider the record; and to inquire whether from it the trial court was justified in the allowance of this $50,000.00 per annum. In the outset it is to be understood that the principal and abstract thought of an amortization allowance are not to be gainsaid; but that the allowance is not to be made upon the record presented is as well not to be gainsaid. It is of the essence of an amortization charge, a charge to retire the property as paid for, that it appear from the record that the property will be useless or worn out

at the end of the given time, or that there will be some complete obstacle to the further use of the property at the running out of the period to which the amortization is applied. If there be no evidence in the record of diminishing or exhausted gas supplies, if the record does not disclose that at the end of the contract period the Gas Company may not go on and sell, or if the record does not evidence the inescapable junking of the property at the end of the period, but if the record does disclose the allowance of annual charges sufficient to keep the property in 100 per cent condition, no lack of supplies, and a place for marketing, then there is no place for an amortization charge. So let us consider the record.

The burden of showing the necessity for an amortization charge rested upon the company. It assaulted a rate fixed by state authority, a rate impressed with the presumption of fairness and adequacy. In order to overturn that presumption, and to show inadequacy in the instant case, the burden was upon the Gas Company. There is no question that there rested the burden. In Section 4(D) of the franchise contract (Record, p. 32) n. b. the company affirmatively agreed that it would assume the burden of proving that its own rates were just and reasonable.

In *Railroad Commission vs. Cumberland Telephone and Telegraph Co.*, 212 U. S. 414, s. c. 53 L. Ed. 577, a telephone rate case from Louisiana, the court said:

> "The rates, therefore, promulgated, must be regarded as *prima facie*, fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable."

In *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, s. c. 53 L. Ed. 371, the assault was upon a water rate ordinance of Knoxville. As appurtenant to this question of the burden, the court said:

> "If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States."

In *San Diego L. & T. Co. vs. National City*, 174 U. S. 739, s. c. 43 L. Ed. 1154, the court manifested its caution thus:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulation as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

In *United Fuel Gas Co. vs. Railroad Commission of Kentucky*, 278 U. S. 300, s. c. 73 L. Ed. 390, there was up for decision the rate at which the United Fuel Company, that 100 per cent subsidiary of the Columbia, which is selling gas to the like subsidiary, the appellant, might sell its gas at Ashland, Kentucky. There, as here, the matter had been taken to Kentucky's public utility body, the Railroad Commission. It eventuated in a rate of thirty-two cents. The case will bear reading in its entirety for its illuminating value upon the present case

and the issues presented in it. As pertinent to the precise point here, that of the burden, the court wrote:

> "The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellants, and, to justify judicial interference with the action of state officers in fixing the rate assailed, must be supported by clear and convincing evidence."

Possibly we trespass in adducing any authority to support so elementary a rule; and our apology for citing it lies rather in the fact that it aids us in saying more clearly what we want to say, and that is this:

The reproduction witness for the Gas Company, Mr. Kimball, gave for the appellant the only statement in the record dealing with the subject of amortization; and what he said was by way of assumption, and not of testimony. He said no word about gas supplies, their quantities nor duration. No witness for the Gas Company stated anything about the quantities of supplies, nor how they might endure through the years. What Mr. Kimball said is an interesting instance of what arithmetic and theory can do—or try to do. Let us parallel column Mr. Kimball:

He says that he makes an amortization charge of $94,688.00, and that the like sum added each year, put in government three-and-a-halfs, "at the end of the twenty-year period would add up to the amortizable value of the property, *which would at that time have no value.*" (Record, p. 223.)

Then he was asked (Record, p. 223):

"At the same time you build up this amortization fund, you make an outlay of earnings each year of $20,000 necessary to keep the property in A-1 condition?"

"And you have taken that in this instance at twenty years?"

"I have predicated these figures on an estimate of twenty years."

And he answers: "That is right."

"Is that justifiable?"

"Yes."

Now let us understand that a little. He says that he has "predicated" his figures of amortization "on an estimate of twenty years." The contract period of this particular franchise was twenty years; and Mr. Kimball seems simply to have assumed ("estimate" is his word) that when the twenty years were up, the gas supplies would be exhausted, or the plant otherwise of no value. And Mr. Kimball himself (Record, p. 226) comes to admit that he had nothing, knew nothing, upon which to rest his "estimate." We quote this excerpt from his evidence:

> "Q. Have you any information of your own as to undeveloped supplies of natural gas in Eastern Kentucky, particularly in the Big Sandy Fields?
>
> A. No, I am not familiar with the geology of that.
>
> Q. And you don't undertake to say that there are supplies of gas there that will last indefinitely? A. No, I am not prepared to say that.
>
> Q. Of course if there were such supplies there it would destroy to a large degree the amortization theory which you set out for a period of twenty years? A. Of course if I was convinced that there was an indefinite supply it would change my figures."

But Mr. Kimball further elucidates his true understanding of the matter, perhaps unintentionally. He says (Record, p. 223) that the "$20,000.00 *is to take care of the depreciation.*" But he theorizes for something

more. He would retire for income purposes the 100 per cent property as useless at the end of the franchise twenty years, some fourteen years away. We emphasize the statement that he retires the property "for income purposes." As a matter of actuality, he had not a leg to stand on. The burden was on the company to demonstrate the absence of gas, or to introduce such probative testimony as reasonably to convince the mind that at the end of this fourteen years there would in fact be no gas available. We will not labor the point to discuss it again that the company introduced no such proof. Mr. Kimball, keeping the property perfect at the expense of the company's customers, upon the simply arbitrary, and patently unsound, theory as pronounced by him, wrote in his amortization charge "on an estimate of twenty years." "Estimate," according to the lexicographers, carries the intent of assumption, and not of actuality, not of numbering and counting. It is submitted that fair reasoning minds cannot go along with this assumption of Mr. Kimball; for the idea of an exhaustion of gas supplies is not only not sustained by the record, but has no basis as within the record. Outside of the record, we may take stock, with propriety, of matters of common public notoriety and of the current happening in the every day world; and we may take stock of the fact that the Columbia Company, in the face of its direct obligation (Franchise, Section 24) "to take all reasonable means and measures to furnish an adequate supply of natural gas to the City of Lexington, and its inhabitants, at all times during the terms of this franchise," has built its own pipe lines from these very Kentucky fields to supply Washington, Baltimore, Philadel-

phia and New York, and that it as well has brought from the Pan Handle area of Texas gas into a physical connection with that network of lines reaching, among other places, back down here to Lexington, Kentucky. We may take stock of the record fact that, again in the face of this obligation to supply natural gas throughout the terms of this contract to the citizens of Lexington, the company has extended its lines to serve Georgetown and Cynthiana, additional Kentucky towns. Not only is there not any proof behind Mr. Kimball's assumption of the exhaustion of the gas, but an incontrovertible deduction from the facts in the record that the gas will not be gone. And this $50,000.00 charge, absolutely unsupported by anything save the baseless guess of Kimball, is not to tbe allowed. Literally and exactly, the company is earning this $50,000.00 every year, and it will have its plant and its gas fourteen years from now, just as it has them now; and it is a fanciful and an unfair thing to make the citizens of Lexington contribute in annual charges such sums as will pay the Gas Company once over for its properties, and yet pay in addition such annual sums as, according to Kimball himself, will keep the property in 100 per cent condition.

He "predicates these figures on an estimate of twenty years"; but we are not enlightened as to why he does. It cannot be that he thinks the property will be worn out; for he expends enough, the $20,000.00, annually to keep it in perfect condition. He cannot assume that the gas will be gone, for neither he nor any other witness upon his side has opened his mouth to say a single word about any lack of enduring supplies, either of the United Fuel Gas Company, or of that dozen or so

of companies elsewhere named herein, who under contract were supplying gas to the appellant. He can not mean that the property will be worn out physically, because (Record, p. 222) he makes this significant statement: "I can come here thirty years from now and if the company continues, it will be in that same relation; and as the property wears out it substitutes new property, so that it remains the same practically from year to year." Now let it be remembered that the opinion and decree of the court left in Lexington's part of this $20,000.00 of extraordinary expenses to keep the property in that perpetually good condition. Another witness as well for the company has something to say upon this subject. Mr. VonGemmigen, whose experiences have been of the widest, says (Record, p. 228):

> "It has been my experience in inspecting a number of gas systems * * * that there is a point when deterioration practically no longer becomes a factor, this point being the balance between replacement and maintenance as against the forces of deterioration. In other words, you can depreciate a single unit of an operating system, but the whole system does not in a practical depreciation meet a certain point, *because maintenance offsets depreciation.*"

It cannot be that Mr. Kimball's assumption for a complete amortization in twenty years rested upon any idea that the transmission lines would then be useless, as having no places, no towns or cities to serve; for it is the record here (p. 123) that this same line serves Mt. Sterling and Winchester and Versailles and Frankfort and Paris in Kentucky, and that since this litigation started, claiming a complete right of amortization in

twenty years, the company has extended these lines into the new-customer towns of Georgetown and Cynthiana. It does not show when or how, and whether, if ever, its right to supply gas to these several other communities will end. It does show that it distributes its gas in Lexington through the mains of the Lexington Utilities Company. And the court knows judicially that the Lexington Utilities Company occupies the streets of Lexington under a charter (see Printed Acts, General Assembly of Kentucky, Session of 1876, Chapter 315, page 475) granted prior to the adoption of the present Constitution of Kentucky; and as a matter of law the court knows that these old legislative charters constitute perpetual contracts between the Commonwealth of Kentucky and the grantees under them, superior to any provisions in the present Constitution. A typical Kentucky case to establish that rule is that of *Adkins, Trustee, vs. Ashland and Ironton Company,* 210 Ky. 532. A typical case from this court is that of *City of Louisville vs. Cumberland Telephone and Telegraph Company,* 224 U. S. 649, s. c. 56 L. Ed. 934. And these lines so held by the Lexington Utilities Company are employed under perpetual lease by the appellant in its gas distribution at Lexington (Record, p. 84). It is always difficult to take a record and to establish a negative; and in the instant matter we must content ourselves with the unhappy course of the direct and categorical statement that no witness for the Gas Company said one word upon any of these subjects. Again, therefore, resting upon our right under *Langnes vs. Green,* we differ with the trial court in the propriety of making this amortization allowance; for it was made upon pure assumption. If

the property, therefore, were kept up to an 100 per cent condition (and Mr. Kimball and Mr. VonGemmigen say that it was), and if there was no proof brought forward by that litigant upon which rested the burden, either of a lack of market or a lack of supplies, there is, there can be, it is submitted, no propriety in the allowing of this amortization charge. And Mr. Kimball, upon the physical side of the property, found that for the twenty years of its existence, there had been a depreciation of only 9 per cent over all (Record, p. 222). And the company in its own balance sheet (Record, p. 213) had already at the end of 1926 built up, and had a depreciation fund of $1,162,062.69, a sum some $75,000.00 greater than the company's entire rate base value of $1,586,000.00, as found by the court's opinion and decree here.

But there was proof of gas supplies. The court will find at pages 197 to 207 of the record a very full exposition of Kentucky gas supplies as made up by Mr. Beckner, a geologist connected with the Louisville Gas and Electric Company. His summary is to be found at page 205 of the record. It demonstrates a practically inexhaustible supply of gas in the Kentucky fields. He says nothing about West Virginia and other sources of supply. We have in the record, however, a visual demonstration of these sources of supply. The court will please turn to that map shown as exhibit "Hunter No. 2," sent up by special order of the trial court as an exhibit for use upon this appeal. It presents a graphic demonstration of the inter-connecting lines of the Columbia, the parent company. It demonstrates that *all of the gas that the Columbia has* is free, by pipe line connection, to go into Lexington, Kentucky. And if we

do not trespass again in referring to a judicial knowledge of the times, it may be commented how at Muncie, Indiana, this company's lines have now tied in to a great pipe line gas supply from the Pan Handle of Texas, and how, confident of its supplies, it has built its lines from these very fields, indeed from eastern Kentucky itself, to supply the cities of Washington and Philadelphia.

We may not just reach up into the air, and upon an assumption of a public utility expert, assume, or guess, or estimate that the properties of the appellant, at fourteen years from this time, will have no value; and we may not concede that the citizens of Lexington must contribute annually, over and above a fair rate for the gas, and over and above a charge annually to keep the property intact, such a sum as would pay for the properties 100 per cent at that time. Assumption is not reason; and proof must rest upon some such element of fact, fact as opposed to assumption, as that it can appeal to our reasons and command our respect. And, again, through no more desirable (upon our part) method than bare statement that a thing is not in the record, we reiterate it that it is not in the record that there should be allowed any amortization charge. And this amortization charge, unsupported in the record, if taken out of the decree, would reduce by four cents the price at which, other considerations being laid aside, the company would have to sell its gas at Lexington; and four cents off of fifty cents, the trial court's conception of a fair rate, leaves forty-six cents for the gas, which is only one cent greater than that fixed by the Commission, and which hardly justifies what we are all doing here.

And in making this point, we again stress it that the courts had not the right to go into the act of the Commission further than to determine whether it were meretricious; and that the trial court, having none the less gone into it without that ascertainment, was wholly within a just and equitable treatment of the matter when it wrote its decree upon the condition.

And as upon this amortization subject: If there were question about the right in the appellees to make the argument, to point out, and stand upon, the insufficiency of the record to support the $50,000.00 annual charge, it would seem to be answered by *Langnes vs. Green*, and *United States vs. American Ry. Express Co.*, 265 U. S. 425, *supra*. But another case addresses itself directly to the subject, *United Railway and Electric Company vs. West et al., as the Public Service Commission of Maryland*, 280 U. S. 234, s. c. 74 L. Ed. 390. The court said:

> "As the amount of depreciation to be allowed was contested throughout, is a necessary element to be determined in fixing the rate of fare and is closely related in substance to the case brought here by the company's appeal, it well may be considered in connection therewith. In these circumstances neither cross appeal nor *certiorari* is necessary to present the question."

Let it finally be borne in mind that, *in addition* to all ordinary repairs, and *in addition* to the $50,000.00 amortization charge, the court's opinion allows the company an annual charge of $15,000.00 for "extraordinary maintenance," at Lexington, $10,000.00 of it for the company's own property, and $5,000.00 of it for the Lexing-

ton Utilities property rented by it, and which it does not have to repair. The figures do not fall substantially below those of the company's expert, Mr. Kimball. Mr. Justice Lurton, in the *Knoxville Water Company* case, warned against this very duplication. He said that if repair and replacement work was "met out of the current income of that year, thereby diminishing the net income, * * * there will be a double deduction on that account, first by paying such charges as they occur, and thereafter by a contribution out of the remaining income for the same subject."

Finally: the burden rested on the Gas Company to pave the way for an amortization charge. Did it meet it?

(a) It showed nothing about the probable or possible exhaustion of gas supplies.

(b) It showed that it kept, it received an allowance for keeping, the property in 100 per cent condition.

(c) It disclosed no absence of a future market, with a consequent junking of its lines.

(d) It showed an actual depreciation of some nine per cent (Record, p. 222), less than one-half of one per centum per annum during all its past history.

And yet, upon nothing more substantial than a hypothetical assumption by Mr. Kimball of a gas exhaustion in fourteen years from this time the court adds $50,000.00 per year to the annual expenses by way of what Kimball, the witness, calls amortization. This would result that at the end of the franchise, the company would have its 100% properties, and their value once over, accumulated from its annual amortization exactions. If

there were proof in the record that the Columbia Gas organization, fourteen years from now, would be without natural gas, and if there were further proof that its mains and other supplies might not be utilized in the transportation and distribution of gas manufactured in the West Virginia and Kentucky coal fields contiguous to its lines, and if it were possible to believe that, facing such sure ending of all values in its properties the company would, to the last, still pay out its $20,000.00 per year to keep intact the perfection of its property, there might be something of justification for some amortization charge. But the Gas Company took the burden here. And in order to justify a charge based on the property's becoming useless in any given period of time, it must have put in some manner of evidence to support an exhaustion of natural gas within that time. It must prove as well the inutility of its lines for all other purposes. No single word of testimony is brought forward by it on either subject. In paying all the regular annual business and repair expenses, in paying the $15,000.00 per annum for hypothetical extraordinary repairs, the present customers are paying full measure. The property is not wearing out in their service. It is unfair to them to exact of them as well the cost of retiring a property which no witness has said must be retired. And none of us believe, if the matter might be decided upon our judgments, independent of any record proof and in the exercise of common reason and common experience, that in fourteen years from now appellant's gas will all be gone, or its property worthless for other uses.

XI

On the rate of return:

The trial court reached the conclusion and decreed that a seven per cent rate of return or earning was fair. Of that there is complaint. Perhaps, something should be said to justify the use of that rate of return. We justify it upon the following authority:

In *Willcox vs. Consolidated Gas Company* (a gas case, it will be noted), 212 U. S. 19, s. c. 53 L. Ed. 382, the Supreme Court said that a six per cent rate of return was sufficient.

In *Cedar Rapids Gas Light Company vs. Cedar Rapids*, 223 U. S. 655, s. c. 56 L. Ed. 594, the Supreme Court upheld a rate which was something in excess of six per cent.

In *Des Moines Gas Company vs. Des Moines*, 238 U. S. 153, s. c. 59 L. Ed. 1244, the Supreme Court declined to reverse the District Court upon the latter's upholding of a six per cent rate of return.

In *Georgia Railway and Power Co. vs. Railroad Commission*, 262 U. S. 625, s. c. 67 L. Ed. 1144, the court held a rate of 7¼% in a gas industry to be non-confiscatory.

In Pacific Gas and Electric Co. vs. San Francisco, 265 U. S. 403, s. c. 68 L. Ed. 1075, the court approved a 7 per cent return on properties devoted to gas service in the San Francisco district.

In *McCardle vs. Indianapolis Water Company*, 272 U. S. 400, s. c. 71 L. Ed. 316, a late full emanation from the Supreme Court upon the subject, the court upheld

the decision of the state commission in its finding of "7 per cent to be a reasonable rate of return."

There is a certain inclination to rely upon *United R. & E. Co. vs. West,* 280 U. S. 234, s. c. 74 L. Ed. 390, as demonstrative that any rate less than 7.44 per cent for a public utility would be unfair. But that such an argument is misconceived is made clear by the court's opinion in *Wabash Valley Electric Company vs. Young, etc., as the Public Service Commission of Indiana,* (January 9th, 1933) Advance Sheets, pamphlet 6, page 348. In this latter case the court made it clear that the *United R. & E.* case, with its discussion of returns of 7½ and 8 per cent, had to do with a street railway company, compelled to meet the growing competition of private automobiles, public omnibuses, and other carriers, and it set it off against this public utility concern supplying electricity in a field where it had a practical monopoly; and it commented that it might fairly be assumed that the financial structure of the Public Utility Company there, was "greatly strengthened by its affiliations and by the interested support of the parent company to which it belongs"; and it held a 7 per cent return to be non-confiscatory. If one set about searching for a monopoly in the sense that not only was there no competition, but that there could be no possible competition, one would not need to go beyond the instant case. It need not be recalled how the Central Kentucky Company here, with its somewhat restricted territory, and its somewhat restricted sources of supply, has been strengthened immeasurably by its incorporation into the Columbia's giant family. See record, page 195, where the Columbia

declares its magnitude, the five million people consuming its gas, and its "united, interconnected combination of super-fuel and super-power service." And the Central Kentucky Company, through its "three principal officers" (Record, page 207), asserted (p. 208) that the strong position of the Columbia was well known.

It would be wholly impossible to collate all of the myriad rate of return cases. Some of them reach the conclusion that 8 per cent is fair, others that 6 per cent meets the demands of justice. We submit that the Supreme Court cases cited are of highest authority; and that we may very well rest upon them. It may be noted that this court (*Bluefield W. and I. Co. vs. Public Service Commission*, 262 U. S. 679, s. c. 67 L. Ed. 1176; *United R. & E. Co. vs. West*, 280 U. S. 234, s. c. 74 L. Ed. 390, and other cases) conforms a fair rate to that generally earned at the time in the same locality in other business enterprises. In Kentucky the lawful interest rate is 6%. And he would be a wizard who, in Kentucky, could so put out his investment funds, as loans or in the engagements of business, as to earn him more than 6%. This court, in *Galveston Electric Co. vs. City of Galveston*, 258 U. S. 388, s. c. 66 L. Ed. 678, recognized, too, the tendency of the business times upon rates, thus:

> "We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were."

Recognition was given to the same factor in the *Mccardle* case; and in *Lincoln Gas & E. Co. vs. Lincoln*, 250 U. S. 256, s. c. 63 L. Ed. 968, the factor of the then up-

ward trend was considered. (In passing, it may be remarked how, in this *Lincoln* case, it was considered that the "legal rate" of interest in Nebraska was 7%, and how the court thought 1% additional, an 8% of return, would be fair. Cf. the "legal rate" of 6% in Kentucky and the 7% of the decree here.)

An historic study of many of the cases, and of the attitude of many of the courts on the subject, demonstrates how wide is the variation between the judicial minds addressing themselves to this subject of return. It demonstrates as well how, in the last analysis, the end arrived at in each case is shaded by the mental processes of the particular mind which may be considering the case —"an opinion largely," as characterized by a member of the court. There is no standard, unhappily, by which the subject may be measured. There is no rule of twelve (12) inches from which we may say with certainty that a foot has been spanned. No human intelligence is so impeccably accurate as that it can divide the thread-like line between a fair and an unfair rate, and comfort itself with the reflection that the division is exactly done. Who can say that six and three-fourths (6¾%) per cent might be insufficient and that seven (7%) per cent would be sufficient? The Railroad Commission was familiar with conditions in the Commonwealth of Kentucky. Its seat was at Frankfort, the capital, some twenty-five miles from Lexington. It, of course, knew the business conditions about Lexington. The trial court was composed of three judges, two of them Kentuckians, the other living within a mile of Kentucky. They, too, must have been familiar with conditions in Kentucky and in the Ohio valley. All of them said that 7% was sufficient.

And it is to be doubted whether any of us have any better judgments. And after all, those of us who sit upon the courts of the land must give to other men and other minds the benefit of their surer knowledge, gained from closer association with the events and controversies out of which emerge their conclusions. And though it is a little bit outside the realm of legal debate, we are minded to insert here an excerpt from an essay upon the influence of the judge's individualistic point of view as influencing his opinion:

> "We are reminded by William James in a telling page of his lectures on Pragmatism, that every one of us has in truth an underlying philosophy of life, even those of us to whom the names and notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter. * * * Of the power of favor or prejudice in any sordid or vulgar or evil sense; I have found no trace, not even the faintest, among

> the judges I have known. But every day there is borne in on me a new conviction of the inescapable relation of the truth without us and the truth within."*

When this proceeding shall have come out of this court it will have passed through the mental processes of three different tribunals, (a) the Railroad Commission of Kentucky, (b) the three-judge District Court, and (c) this court. It should not have gone beyond the first of them, unless the second one of them, on an inspection of the record, had found that the first of them acted without evidence and without reason; and reflecting about the variant processes of the various minds which have addressed, and are addressing, themselves to the subject, would we not all do very well to accord to the conclusion of that constitutional rate-making party, that due process body, the Railroad Commission of Kentucky, the sanctity which the laws of the land throw about it? Upon what theory of right, and upon what ground of right, may other judgments and other minds determine for themselves that which the Commission itself, in the exercise of a fair reason, and upon it full hearing, had the right to decide?

But before leaving this rate of return, there is a certain other calculation which will be of service to us and may be to the court. It is to ascertain the relation between the sale price of gas in Lexington and the rate of return there—how much, to illustrate, would an increase of one cent per thousand in the selling price increase the rate of return; and how much, *per contra,* additional

*Cardozo, "The Nature of the Judicial Process." Yale University Press.

would have to be charged per thousand for the gas to increase the rate of return one per cent?

Now there was sold in Lexington in 1926 1,300,000 M. c. f. An increase of one cent per thousand would have increased the company's revenue for that year some thirteen thousand ($13,000.00) dollars. The rate base, as fixed by the trial court, is two million, two hundred thousand ($2,200,000.00) dollars, minus. One per centum (1%) of this sum is twenty-two thousand ($22,000.00) dollars. So it would take one and 7/10 (1 7/10c) cents ($22,000 divided by $13,000 equals 1.7) additional per M. c. f. for the gas to equal one per cent (1%) of return on two million, two hundred thousand ($2,200,000.00) dollars. That is, in order to increase the return to the company from seven (7%) to eight (8%) per cent, there would need to be an increase of one and 7/10 (1 7/10) cents per thousand for the gas. And stated the other way—one (1c) cent per thousand increase in the sales price of the gas would increase the company's rate of return in the proportion of thirteen-twenty-seconds (13/22) of one (1%) per cent, or fifty-nine hundredths (.59) plus, of one (1%) per cent.

There is another aspect of this subject, the rate of return, that demands some comment. There is a distinction, as well wanting in any definite measure of sufficiency, between the concept, upon the one hand, of a rate that might fall within the constitutional prohibition, a confiscatory rate, if you will, and, upon the other hand, a rate which the weighing mind might gravely question as to adequacy, and yet which that same mind would be very, very slow to declare to be unconstitutional. As

an able writer (Whitten, page 1883, of his Valuation of Public Utilities) puts it:

> "There may be considerable leeway in the realm of fair or just rates for service, a broad twilight zone where rates or charges for service are not so low as to be unjust and confiscatory nor so high as to be unjust and exorbitant."

In *Louisville & Nashville Railroad Company against Siler*, 186 Fed. 176, the Sixth Circuit, Judges Warrington, Sanford and Denison sitting, very ably portrayed this distinction. It wrote:

> "No averment is made either in terms or effect that the new rates would not yield a profit to the carrier; much less that the entire business would not do so. In the absence of a showing that property is taken, the protection of this guaranty cannot be invoked. What may be a reasonable rate or return, as a matter of legal policy, having due regard to encouraging the investment of capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question."

In the Supreme Court of California in *Contra Costa Water Co. vs. City of Oakland*, 159 Cal. 323, 113 Pac. 668, there was up the constitutionality of a city ordinance. The court wrote:

> "In fixing upon such percentage, however, the court is not to act upon what it, as an original question, might think to be fair and reasonable, but is rather to determine what is the lowest percentage which could properly be thought by the rate-fixing body to be fair and reasonable. On this question, there must be a certain range of discretion which may be traversed by the city council

> without infringing upon constitutional rights. If the ordinance gives a rate of return which, although low, is not palpably unreasonable, the court is not to upset the action of the council because it may think a higher rate more appropriate."

District Judge Hough, of the Southern District of Ohio, in *Columbus Gas and Fuel Company vs. City of Columbus*, 17 Fed. (2d) 630, thus distinguishes between a rate which is non-confiscatory and one which is fair:

> "There is a well marked distinction between a return non-confiscatory in character, and one which is fair in a commercial and economical sense. A rate of return may be all sufficient in fulfilling the demands of the Fourteenth Amendment of the Constitution of the United States, and at the same time fail in amount to encourage and justify the operation of a utility business under that degree of maximum efficient service to which the public is entitled. The former is a purely judicial question, while the latter is essentially legislative."

And again we bring forward the thought that the trial court may not enjoin the rate of the Commission against the presumption of its sufficiency, save upon the court's conclusion that the Commission acted without evidence, and further upon the court's clear conviction of mind of the confiscatory character of the rate. It may not enjoin because, taking the matter by and large, it might not conceive the rate to be in accord with the experiences, investments, and the opportunities of observation of this man or that man, and of this mind or of that mind. And it is submitted that though the city believes the rate to be five cents per thousand higher than a rea-

sonable rate, the record assuredly demonstrates that the 45-cent rate cannot be found to be confiscatory, cannot, as within the Constitution's prohibition, be a taking of complainant's property without due process of law. The minds of those composing the court must have a sure conviction of confiscation. A conclusion that the rates are not those that the court would fix will not permit the trial court to enjoin the Railroad Commission's order, a doctrine with which this court is in full accord. See *Willcox vs. Consolidated Gas Company*, 212 U. S. 19, s. c. 55 L. Ed. 382.

XII

In *Banton vs. Belt Line Railway Corporation*, 268 U. S. 413, s. c. 69 L. Ed. 1020, the court again tritely repeated what it has been quoted hereinbefore as saying, thus:

> "But the presumption is that the order was reasonable and valid, and the burden was on appellee (the utility concern) to establish its invalidity."

Naturally, in order to establish the invalidity of the Railroad Commission's order here, the Gas Company had to start with evidence sufficient, addressed to the sundry elements of value, to constitute proof of a rate base value. But it introduced no proof from which the court might deduce any conception of values for rate base purposes, save in such proof as it has endeavored to introduce in support of the reproduction value of its properties. In this it has signally failed to meet the rule of the Supreme Court. That court has written it with emphasis and clarity that reproduction costs under

current conditions not only may, but must be considered by the hearing body or the court in ascertaining rate base values. But it has never written that reproduction costs might be the *sole* standard, or that a public utility could prove its case *alone* by the introduction of proof of reproduction costs.

The Supreme Court has never said that reproduction cost is conclusive evidence of sole evidence of value. Let us get that idea firmly set in our minds. In the leading and much cited case of *Smyth vs. Ames,* 169 U. S. 466 (at 547), s. c. 42 L. Ed. 819 (at 849), the court said this:

> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Then again in the *Minnesota Rate* cases (*Simpson vs. Shepherd*), 230 U. S. 352, s. c. 57 L. Ed. 1511, the court said:

> "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment, having its basis in a proper consideration of all relevant facts."

Again in *Georgia Railway and Power Co. vs. Railroad Com.*, 262 U. S. 625, s. c. 67 L. Ed. 1144, the court said:

> "The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost, less depreciation, was clearly correct. * * * The ascertainment of that value is not controlled by artificial rules."

In *St. Louis and O'Fallon Ry. Co. vs. United States*, 279 U. S. 461, s. c. 79 L. Ed. 798, the court said:

> "The *elements of value* recognized by the laws of the land for rate-making purposes have been pointed out many times by this court. *Among them* is the present cost of construction and reproduction." (Italics ours.)

So in this latest declaration the Supreme Court emphasized it that, while some attention must be given to reproduction costs put in in lawful evidential form, such costs were not exclusive, but were "among" the sundry factors which should be the subject of consideration. The court went on to say, to make explicit its view, that "the weight to be accorded" testimony about reproduction costs was not before it; and that in many instances *"the ultimate value * * * should be placed far below the sum necessary for reproduction."* (Italics ours.)

In *Standard Oil Co. vs. Southern Pacific Co.*, 268 U. S. 146, s. c. 69 L. Ed. 890, the Supreme Court said:

> "It is to be borne in mind that value is the thing to be found, and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide."

Lastly upon this subject of reproduction cost, we are much struck with what Whitten, in his Valuation of Public Service Corporations, V. 1, p. 616, has to say upon the subject:

> "Reproduction cost, as related to public utilities, is a concept that has little or no practical significance except as an evidence of value where conditions are such that it is difficult or impossible to establish or find market value in the economic sense. Its principal function is to serve as a handmaiden to fair value and just compensation. It follows that every assumption upon which a reproduction cost estimate is made and every method used in making it, that tends to bring a fantastic or inconsequential result and thus destroy or impair the usefulness of reproduction cost as an element in the determination of fair value or just compensation, is an assumption or a method that should be discarded. It is the result that counts. A reproduction cost estimate that obviously has no relation to fair value or that outrages the sense of justice as a measure of just compensation is a useless estimate, no matter how elaborately the unit costs may have been computed, no matter how faultlessly the logic of replacement assumption may have been carried out."

So it is submitted that the Gas Company has failed to prove its rate base value by any sufficient evidence. For it has put into the record only a single one of the many elements which must be the subject of consideration in any lawful process of valuation. And since, as within the Supreme Court's decision in the *Ashland* case (*United Fuel Gas Co. vs. Railroad Commission*, 278 U. S. 300, s. c. 73 L. Ed. 390) the Gas Company, in order to establish the unfairness of a rate, must have proved the value of its property on which it was entitled to a return,

by competent evidence of the sundry elements which the Supreme Court said must be considered, it has failed to maintain its burden; and the trial court's decree might very well have rested alone upon its failure of proof.

And again upon the doctrine of *Langnes vs. Green*, it is submitted that the trial court's decree might stand upon this additional reason, rather than upon the conditional decree of the trial court.

XIII

Again, utilizing our right to reach the trial court's result through a different process of reasoning, it is submitted that the court adopted a rate base without sufficient evidence from the appellant, and entirely too large as measured by all the evidence in the record.

There are four avenues of approach to value in the record:

(a) The reproduction method by Mr. Kimball for the Gas Company.

(b) The same method by Mr. Carter for the City of Lexington.

(c) The actual cost figures by the accountant, Mr. Jirgal, evaluated upon present day prices.

(d) The actual price paid by the Columbia for all the properties of the Central Kentucky in the autumn of 1927, the year in which the franchise contract was made.

We may briefly scan and take stock of the four methods:

(a) The value of Mr. Kimball's testimony, like that of any other witness, may be measured by the sure test of whether the witness has any knowledge of that to

which he testifies. It is fundamental that evidence of values must be adduced by witnesses who are informed of, who know, who have seen, who have experienced the things about which they testify. The evidence of a witness, for example, about the extent of the depreciation of a piece of pipe which he has never seen is not even persuasive. What some one may have told the witness about the condition of this piece of pipe is not to be given in evidence by the witness; for it would be hearsay evidence. The law forbids hearsay evidence; and the reason is that the evidence, in its primary analysis, is the evidence, not of the witness, but of the retailer of the supposed facts to the witness; and there is no opportunity to cross examine or search out the conscience and the knowledge of the retailer. The practical application here is that the Gas Company rested its claim of value purely upon a compilation put into the record by Mr. Kimball; and Mr. Kimball's testimony is a pure example of hearsay testimony. It is not, therefore, to be accepted; for the rights of men and the rights of property are not to be adjudged upon speculation, estimation, and hearsay testimony. Such, beyond question, is the character of Mr. Kimball's testimony. In an effort to avoid prolixity, we do not quote Mr. Kimball's testimony. We ask the court to turn to pages 218 to 227 of the record. They demonstrate, it is submitted, that Mr. Kimball did not know what he was talking about. He spent not exceeding two days in Kentucky; and no part of any one of them upon the Gas Company's properties. He didn't see any wells. He did not see any pipes. He did not see any compressor stations. He never got any freight rates. He never ascertained the transporta-

tion charges for material. He did not know the labor costs. And he did not know to what stations were the freight rates he applied.

We venture this assertion: had this testimony been offered in ordinary course before any informed trial court, it would have been excluded just as fast as it was offered; and we have a reflection and a feeling that no engineering testimony is to be accepted unless the engineer has applied his engineering knowledge to observe the things about which he testifies. Mr. Wigmore (Evidence, Section 657) lays down the rule with rare accuracy, thus: "What the witness represents as his knowledge must be an impression derived from the *exercise of his own senses,* not from the reports of others." The writer himself italicizes the "exercise of his own senses"; and what he means is that a witness is restricted to events or facts which he thus ascertains. The sense of sight, with its reflex effect upon the perceptive sense of values, is a *sine qua non* toward valuation; and since Mr. Kimball saw nothing, he knew nothing; and this one avenue of reproduction cost is foreclosed to us.

(b) Mr. Carter (Record, p. 229) a consulting engineer, educated at Perdue, for eleven years in the Engineering Department of the Public Service Commission of Indiana, and with large experience in the valuation of public utilities (he was the Indiana Commission's engineer in the *McCardle* case) made the appraisal for the City of Lexington. He saw and inspected himself everything about which he testified (Record, p. 231). His testimony is, therefore, competent and uncontroverted. He found that the cost of reproduction of the total physical property of the Central Kentucky Company allocable to Lexington (Record, p. 190) plus Carter's value of the

Lexington Utilities properties, including the value of the intangibles as fixed by Kimball (on the assumption that assuredly that could not be less than fair), to make a total valuation of the company's own and leased property over all, allocable to Lexington, as depreciated to present conditions, of $1,687,897.00.

(c) Mr. Jirgal went to the books of the company (Record, p. 229). His figures are definitely set forth in head VI of this paper. He has a resultant over all of values allocable to Lexington of $1,671,547.00.

(d) The Columbia bought the Central Kentucky properties in the year of the making of the franchise contract, through a stock exchange, at a price then equivalent to $2,820,000.00 (Record, pp. 208-10). Upon the same factor of allocation, 55.1%, the value of the entire properties of the Central Kentucky allocable to Lexington (Carter Exhibit 8, Record, p. 190) is $1,913,157.00.

We may take the average of these three valuations (which are no more widely different than might be expected), thus:

Carter valuation	$1,687,897.00
Jirgal valuation	1,671,547.00
Purchase price valuation	1,913,157.00
Total	$5,272,601.00

We divide by three for the average; and we get for an average over all $1,757,533.00. Then we have this calculation:

Total rate base values as fixed by the trial court	$2,198,107.00
Total rate base values as upon the three bases method	1,757,533.00
Excess of the court's valuation	$ 440,574.00

So it is submitted that the rate base of the trial court was too high by an excess at least of $440,000.00; and since 7 per cent upon that sum of $30,800.00, it is submitted respectfully that the trial court's ascertainment (Record, p. 89) of a return of $144,574.00 should be increased by this $30,800.00, giving an actual net return of $174,800.00, making, as upon the court's valuation of $2,198,107,00, a return net of 8 per cent. As figured upon the over-all three-approach total value of $1,757,514.00, it works a rate of return of substantially 10 per cent. And further: The foregoing calculations working out the 8 per cent and 10 per cent results, allow for the annual amortization charge of $50,000.00 as fixed by the trial court. If we be right in our contention that this charge may not be allowed upon assumption, and may only be allowed upon proof, proof wholly absent in the instant record, then, if we eliminate this annual charge of $50,000.00, the rate of return works out this way:

Amount of return as found by the trial court after deducting the $50,000.00	$144,574.00
Add the annual amortization charge which should not have been allowed.	50,000.00
A total return of	$194,574.00;

and this sum, $194,574.00, is an annual return of something over 11 per centum upon the average value as just deduced above from the three routes utilized by the city to an ascertainment of values. And it is 9 per centum upon the court's rate base of near $2,200,000.00.

XIV

Point VII of the Gas Company's argument here is that a 50-cent rate would not produce a 7 per cent rate of return; and certain tabular computations are put into the brief to demonstrate that if the cost of the Owsley County gas were included, the rate of return would be only some 2.6 per cent. It is another interesting application of mathematics; for while the mere additions and subtractions are right, the figures thus dealt with are not record figures, and no one may know whether they are right. In the table's own appellation they are an "Estimate—Normal Yearly Basis—1927 Deviation from Mean Monthly Temperature." There are these things about these tables:

(a) They count in *both* the Owsley County post-contract high-cost gas, and the United Fuel 100 per cent co-subsidiary high-cost gas. Let it be remembered that when the one came in, the other went out.

(b) The table is made up on what the company's expert had in his own mind about the difference between results in a warm year and a cold year. Beyond the recognized fact that there would be *some* difference, only omniscience or a rate boosting expert would undertake to say what the difference, brought down to exact dollars and cents, would be.

(c) The table works it out that the more gas there was sold the less would be the return; which would result that the only really profitable year would be one in which no gas was sold.

(d) Will the court, please, look at this in Table I?

The table shows actual sales in 1927 to be in dollars $606,912.00.

It shows *estimated* sales for that year, corrected for temperature, to be in dollars $622,784.00.

It therefore estimates that in a normal year, as compared with 1927, the revenue from sales would be increased by $15,872.00 ($622,784.00 minus $606,912.00, equals $15,872.00).

Then will the court, please, look at this, in this same Table I?

It shows the actual *cost* of gas in 1927 to be $269,703.00. Then writing in the Owsley County gas, and adapting the weather, it increases the gas cost to $360,499.00. That is what it says it is doing. Its explanatory notes on the first sheet of the table show that the first computation is "Taking No Gas from Petroleum Company," and that its other computation is "Taking Gas from Petroleum Company."

Then by the symbol (10) opposite the figures of $360,499 (weather revised cost for 1927) the compiler carries us forward to sheet 3 of this tabulation work. Let the court, please, turn to that sheet, and note that of 2,720,000 M. c. f. of gas purchased that year the tabulator only allows for 550,000 M. c. f. as purchased at 10 cents, leaving all of the excess, 2,170,000 M. c. f., to be taken in quantities from the companies of which it was buying gas *in excess of the market price* of around 10 cents, the average shown in Mr. Kimball's own table. Elsewhere herein, under heading VII of this paper, we have shown how the company had to take none of this high priced gas, save the Petroleum Exploration, and possibly some from one other company. Bearing in mind

now that the tabulation matter is one of theory, one of estimate, is it needful to do more than to enquire whether it is fair, in preparing such a table, to rest the cost, to the extent of more than three-fourths, upon high priced gas which the company did not have to buy? This is all very, very tedious; but it demonstrates rather plainly what may be done in the pyramiding of expert figures in the reaching out after income. They do not seem to us to be persuasive, when once they are understood.

XV

The Gas Company pronounces the theory, and asserts, that it has the right to charge and collect "its own rates and charges, provided only they are reasonable." Then proceeding from that false premise, it urges its right to impose, in addition to the rates at which it may sell gas, a service charge. That, it is assumed, is meant to be the same as that "monthly customer charge of 75c," named in the bill, at page 22 of the record. There is confusion in the idea of what this charge by the month is—sometimes it is called a service charge, sometimes a customer charge, and sometimes a minimum charge; but it is evident that what the appellant wants is the right to charge 75 cents a month to each customer connected to the lines, merely because of the connection and for no gas whatsoever.

The theory propounded by the appellant that it has the right to fix its own charges is untenable. In the franchise contract, out of which comes this litigation, Section 4(D), record page 32, the Gas Company agreed to

submit the ascertainment of just and reasonable rates to the Railroad Commission; and it agreed that it would "assume the burden of proving that the rates and charges promulgated by it * * * are just and reasonable." It is not worth while, in the face of the company's own agreement to leave the ascertainment of the rates to the tribunal lawfully empowered to fix them, either to respond to the argument, or to consider the authorities supposed to support it. In passing, however, it is to be reflected that not one word is said in the record about the propriety, the desirability, or the fairness of a service charge; with the result that the appellant contends for a charge as reasonable, without any of that testimony which it agreed to bring forward to prove that its charges were reasonable.

Before further considering the question of a service charge, we may search out its result:

There were in Lexington as of 1926, 13,000, plus, of gas customers. A charge of 75 cents a month to each customer would bring to the company a revenue of $9750.00 per month, equalling $117,000.00 per year; and equalling further for the eight years, at least, for which this case fixes the rates, eight times $117,000.00, or $936,000.00. The gas sales for this same year of 1926 at Lexington were 1,303,902 M. c. f.; for which amount the sum of $117,000.00 would equal 9 cents per thousand; which again means that in the innocuous looking service charge of 75 cents per meter per month, the company would find 9 cents per thousand for its gas. Seventy-five cents sounds harmless enough; but a million dollars in eight years taken from the people of Lexington, in the face of a contract which forbids any part of it, is rather un-

thinkable. That the contract does forbid it is now submitted:

Section 4(F) of the franchise contract (Record, p. 34) runs thus:

> "The rates, charges or compensation to be charged, demanded and collected by the company as herein provided shall be the total rates, charges and compensation charged, demanded and collected by the company and they shall not be increased by any other charge or device of any kind or description. The rates, charges and compensation finally fixed and determined as provided in Sub-section (D) hereof shall continue in effect until modified, altered or changed under and pursuant to the provisions of the franchise, as hereinafter provided."

With that provision fixed in our minds, it becomes very evident that a service charge is a "charge or device" prohibited to the Gas Company by its own agreement, as just quoted. Let us see if this is not sound:

In Section 4(B) of this same contract (Record, page 32) the company agreed that it would "*within two* (2) *days* after the effective date of the franchise contract promulgate in writing the rates, charges, and compensation which it may deem to be just and reasonable, and which it purposes to charge for its gas service."

The company, within this two days (Record, page 21), as recited by the bill, did file its schedule (Record, page 96). It said nothing whatsoever about a meter charge; and the first appearance of this item anywhere in the controversy was in an amended schedule, put in by the company in May of 1928. It was bound in, it is submitted, by its undertaking to manifest what rates it

wanted to cover this one fixation period by its schedule filed within two days after the contract became effective. It itself recognized that fact, because it complied with it, and because it affirmatively alleges that it did. The very spirit and atmosphere of the contract was that there should be a presentation by the company of what it wanted; and that there should be a rate fixation process starting with those rates as a basis for consideration, to cover the contract period, *i. e.*, the time of the fixation and two years beyond; and no man who reads the contract can find in it, or read into it, any right in the Gas Company to change its contentions and to increase its rates from time to time as the rate fixation proceeded. The very essence of the contract, in its provision for stated periods of rate revision, forbids any such possibility.

In pursuit of the same thought we revert again to Section 4(D) of the franchise contract, that section wherein the company agreed to take the matter to the Railroad Commission. It agreed that it would prove that "the rates and charges *promulgated by it as aforesaid,*" were just and reasonable. In the second paragraph of the contract, immediately above this undertaking (4B), those "aforesaid" rates are identified. They are those rates which were to be filed within that two-day schedule; and there was not any contention for a service charge until the second, and non-contract, schedule was presented for the first time some fifteen months later.

Then (all on page 32 of the record) the following provisions of the contract, expository of what was contracted about, are referred to:

Section 4(D), a part of the rate fixation procedure, refers to the "rates and charges promulgated and filed by the company as aforesaid."

Section 4(C), "The board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate." Forty cents a thousand was a flat rate; and the company, on its side, then had in this same Section 4(C), the right to contend for a "higher rate than 40 cents per one thousand."

Section 4(E), the one providing for the impoundment, provides for flat rate charges of 50 cents and 60 cents per thousand feet.

Section 4(E) again, at the end of this section, has this significant provision:

> "In addition to said temporary rates hereinabove provided for, the company shall have the right to charge three cents ($.03) per one thousand (1,000) cubic feet, if the bill for services is not paid within ten days."

There is, then, the schedule, filed within the two days, that manifestation of what the company expected to contend for, that manifestation which it agreed to make within the two days. It restricts the company to a concept of compensation based upon a flat rate, whatever it may be, of so many cents per thousand cubic feet. It asked and sought no meter charge. When it came to providing for an exception as from this flat rate, it asked, and was conceded the right, to charge three cents per thousand if there were any delay in payments. That was the only exception to what the company might col-

lect under this flat rate conception, either under the terms of the contract or in the two days schedule filed by the company. And then to accentuate it, it fixed it so there could be no possibility of this meter charge, always lurking in the offing. There was written into this contract the provision that "the rates, charges, or compensation to be charged, demanded and collected by the company shall be the total rates, charges and compensation charged, demanded and collected by the company." These rates and charges were to emanate always from the company's own two days schedule. And then to leave it and to have it so that there could not be contention about it, the possibility of a service charge was excluded in the contract words that these rates "shall not be increased by any other charge or device of any kind or description." The words manifestly were not idly written into the contract. It may be surmised, indeed it may be assumed, that they were written in with the full preconception that at some time, somewhere, somehow, there would appear an effort by the Public Utilities concern to lay on some other charge or device. And in that spirit of prophecy the city tried to protect itself by contracting that when the two days schedule had been filed, and when the Commission had reached its adjudication on that schedule, and had declared its final conclusion of what the rate emanating from that schedule should be, that then that fixation should not be increased by any other charge or device of any nature or of any kind. And we are not to be too much concerned about appellant's argument to support the desirability for such a charge; for it has not the contract right to impose it; and if it

had the contract right to impose it, it has introduced no proof to support the propriety of it. And if it were permitted, in the face of its contract, to impose such charge, it should be permitted to do so only by a corresponding or co-ordinate reduction of nine cents per thousand in what otherwise would be a fair flat rate for the gas.

XVI

We may revert again (because of an unexpected, but welcomed, docketing of this cause for present hearing, this brief-work has been done by piecemeal) to the question of rates. A good deal is said by the appellant about some larger but unexplained "hazard" in the natural gas business, as a reason for higher rates of return:

Is this supposed hazard in the exhaustion of the gas? No one testifies to any near future exhaustion. And the court is asked to recall the Hunter map, and the Beckner table of an hundred years' supply.

Is the supposed hazard in any inherent danger in the commodity? If so, let it be reflected that damage claims from electricity present a greater hazard.

Is the supposed hazard in possible competition? If so, let it be reflected that if ever there was a sure monopoly, this company enjoys it here. Coal, dirty, higher-priced and inconvenient, offers no possible competition. And is there even a hint of competing gas?

A thought, an idea, however dogmatic, repeated and repeated, finally tends to become accepted as true. This idea of hazard has worked its way into some of the pub-

lic utility commission work (just as have a thousand other vagrant theories); and it is cited by appellant. We might be more persuaded if we were told, or if it were proven to us, that this sale of natural gas to Lexington is abnormally, in the rate-making sense, hazardous.

And in the face of its own quotation of authority that a rate "is, after all, a matter of opinion," the brief seriously seeks to exact an acceptance of Mr. Kimball's estimation of ten per cent as fair. And again it is to be reflected how a good many of appellant's rate authorities are those of public utility commissions in those states like Montana, Kansas, Oklahoma and Alabama where the interest rates are high. We repeat it that the Commission and the trial judges were of Kentucky and the Ohio Valley, men whose local judgments about investment matters may with confidence be relied upon.

XVII

The appellant is right in its contention that judgment for costs should not have gone against it. The trial court obviously overlooked Section 35 of the franchise contract, which provided for halving certain of the costs. The City of Lexington records itself here (a) that it claims nothing under the decree for costs; and (b) that whenever the case is concluded, it will join the Gas Company in ascertaining the costs covered by the agreement, both those already paid by either side, and those yet to be paid; and that it will equalize the matter forthwith, by paying or receiving, as need be.

XVIII

Appellant concludes its argument with the contention that the city is bound in, not alone to the court's decree, but to the reasoning processes by which the court reached the results in the decree. In the opening of this paper we answered that argument as best we could. But a new thought is injected in the appellant's concluding argument. It complains that the city has put into the record certain evidence favorable to its side; and that since all of the evidence is not in the record, the city is not to have the benefit of the testimony which it put in. Well, the rule of the court is that the appellant shall put into the record what he thinks is necessary; and that the appellee shall, after the service of appellant's schedule upon him, put into the record the evidence that he thinks pertinent. It is a fair construction of the rule (Rule 10, Subsection 2) that the appellant is expected to put into the record all that needs to go into it, and not just his side of it; and as a sort of protection against the inherent weakness of human nature, the rule goes on to provide that the appellee may put in what the appellant has omitted. So, of course, the appellant may not of its own will restrict the record and the testimony to what it would have in the record—though it is not to be gainsaid that the appellant here made a gallant and partially successful effort to that end. But it is candid enough here to tell the court the fact that it knew that the appellees purposed, under the doctrine of *Langnes vs. Green*, and the like authority, to insist upon reasons and material sustaining the decree other than those employed by the court. It says it was put upon such notice; and

the contention was argued, and brought forward, before the trial court when we were making up the record; and the wide sweep of the testimony was at the command of the Gas Company; and if it omitted any testimony which it thinks would throw light upon the issues brought forward by the appellees, it has but itself to blame. It does not mean, of course, to suggest that it introduced any testimony of its gas supplies. It does not mean that it ever once undertook in the testimony to contradict the graphic manifestation of the Columbia's own map, Hunter No. 2. As a matter of fact it introduced not a word upon the subject. Is it not somewhat novel that appellant should ask that the door be shut to the appellees because of the absence of testimony (unknown to us at least) which the appellant had the right to bring here, and on which it was put upon such notice as that, if it had any such testimony, it would, in the exercise of the simplest of prudence, assuredly have brought here? The case of *Halbert vs. United States*, 283 U. S. 753, s. c. 75 L. Ed. 1389, cited and quoted by appellant as sustaining its position, like many other authorities, does not sustain the point to which it is cited, and to which its words are quoted, when it is gone into. Here certain Indians brought suits to enforce their alleged rights to certain land allotments. There was a decree for the plaintiffs in the District Court. It was reversed in the Circuit Court of Appeals; and then came on *certiorari* to this court, which reversed the Circuit Court of Appeals, and went back to the decree of the District Court. Now let it be noted that while the Indians were the appellants in this court, the statement of the evidence was prepared by their opponent, *the counsel for the government*. The

assignment of errors challenged only the rulings of law; but when the matter came up to the Supreme Court, this same government asked a decision on matters of law which had not been in the assignment of errors, but which rested upon facts; and since the assignment of errors challenged no fact, but only rulings of law, the court very naturally declined to go into the facts—facts, let it be remembered, condensed and put into the record by the government itself, and not by mutual arrangement, and not even by the appealing party. So that case does not throw much light upon the right of the appellees here to argue upon facts in the record put in part by them, and upon issues of which the appellant had due notice, *as a subject of contention when it was making up its own record for this appeal.*

XIX

A number of here and there matters appearing in the appellant's brief require some consideration:

(a) The brief states outside the record that "the terms of the ordinance were the result of advance agreement between the city and the company." If it was a matter of negotiation, the statement in the brief that this or that was written into the franchise "for the purpose of *compelling the company*" to do this or that, is beside the mark. If either of the parties to any such contractual conferences was under compulsion, it was the city and not the company; and this for the reason that the city, relying for domestic purposes practically in entirety on this gas service, was without the power to enforce a continuance of the service, was without the power to enforce

the Gas Company to enter into a new contract. The Court of Appeals of Kentucky had settled that in *City of Ludlow vs. Union Light, Heat and Power Company*, 231 Ky. 813, and in *Union Light, Heat and Power Company vs. City of Fort Thomas*, 215 Ky. 384. As well it was settled by the three-judge District Court case (E. D. Ky.) of *Union Light, Heat and Power Company vs. The Railroad Commission of Kentucky*, 17 Fed. (2d) 143. The City of Lexington, because of the equipment in its households, and because of twenty years of construction either in new buildings or in the adaptation of old ones to the use of natural gas, was so circumstanced as that this service to it was indispensable. The Gas Company, upon the other hand, as shown by the record, and particularly by the map Hunter No. 2 (*supra*) had interconnected markets over a half dozen different states in which its gas might be sold. So if there were aught of compulsion, the power of it was with the Gas Company, and not the city. It requires no stretch of the imagination to believe that the Gas Company, having the power, made use of the power; so that the appellant's grief about any "compulsion" in bringing in the new line, and any "heavy penalty" is, to borrow a word from the appellant's brief, absurd.

(b) Here and there through the appellant's brief is interlarded, sometimes the intimation, and sometimes the charge, that the appearance in the contract of a 50-cent temporary rate, and then of a 60-cent temporary rate, is an admission by the city that the company would be entitled to those rates. It is true that those provisions appear in the contract, but it is untrue that any such deduction can be drawn from their appearance; for

the city was careful to contract against the possibility of any such inference; and this was written into the contract, Section 4(C), to be found at record page 32:

> "The board hereby declares that any rate in excess of forty cents ($.40) per one thousand (1,000) cubic feet of gas would be in excess of a just and reasonable rate for such gas service."

In the face of that declaration in the contract to which the Gas Company put its signature, it is hardly in position to argue that the city admitted, by the remotest inference, that the Gas Company would be entitled to 50 cents or 60 cents—or any other sum in excess of 40 cents. An illustrative instance of this unsupported reasoning in appellant's brief is its claim that by the interpolation of the provision for the 60-cent temporary rate, there followed the inescapable deduction that the Railroad Commission must consider the 60-cent conditions—a statement in the face of the just recited fact that the Gas Company had put its hand to a contract which conceded that the city stood upon the contention that anything, at any time, in excess of 40 cents per thousand, was unfair.

(c) It is not thought that the brief for the appellant is meant to be misleading in one of its statements about this Owsley County gas; but lest there might be a misconception about it, it is deemed wise to make clear this fact; it is stated that the minimum cost of gas under the Owsley County contract, the Petroleum Exploration contract, is $300,000.00 per annum. The statement is correct, but it should be extended to say that there is to be allocated to Lexington only 55 per cent, plus, of the total cost, equalling $165,000.00 of that sum, and that the

balance of it is apportionable to the other customers of the appellant.

(d) These statements, taken from the brief for the Gas Company here, are set up in parallel columns for contrast:

"The record shows that the parties had by common consent adopted December 31, 1926, as the convenient and logical date for determining the value of the appellant's property used and useful in rendering the service contemplated in the franchise," and also this: "All of the appraisal witnesses selected as the valuation date December 31, 1926, that date having by consent been mutually adopted because of its proximity to, and substantial identity with, the effective date of the franchise contract."

"The court then says: (2) 'The parties asked the court to determine the reasonableness of the Commission rate on the base value as of December 31, 1926.'

In view of the fact that the Commission applied its rate to *the effective date of the contract*, it would have been absurd for the parties to ask the court to determine the reasonableness of the Commission rate as of any date prior to the contract."

The argument seems to be that it would be absurd to ask the court to treat as identical the franchise contract date of January, 1927, and December 31, 1926, notwithstanding that these two dates, because of their "proximity and substantial identity," had been "by common consent mutually adopted"!

(e) The brief for the appellant inflexibly plants itself upon the conditions existing in December, 1927, when the Owsley County gas had come in; and it is equally pertinacious in ignoring the fact that the United Fuel

Gas Company and the appellant company had at that time been fused into a common entity, with the result that the high-priced United Fuel gas must go out. In homely parlance, the Gas Company would eat its cake and have it, too. The trial court declined to count out the United Fuel gas on the ground, and solely on the ground, that there had not been as of December 31, 1926, the date to which it addressed its work, a merger of the two companies. The opinion says:

> "Inasmuch as we are asked to fix the rate base and determine the income as of December 31, 1926, we are of opinion that for such purposes we should accept the contract price of gas purchased from the United Fuel as part of the cost of operation."

The trial court then differentiated, on the same basis, this case from that of *Western Distributing Company vs. Public Service Commission of Kansas,* 285 U. S. 119, s. c. 76 L. Ed. 655, where the fiction of the right to charge an arm's length pre-existing rate after the merger of the contracting parties was denounced. It is obvious, therefore, that it was in the mind of the trial court that if it should apply its faculties to the ascertainment of a fair rate to a post contract date, it would, in the searching out for that "just and reasonable" rate to which the company was entitled under the contract (and no more and no less), have disregarded the arm's length contract existing prior to the common ownership of the two companies, and would therefore have eliminated all costs of the United Fuel gas in excess of the average that was being paid for gas generally. Elsewhere in this brief it is sought to be demonstrated that the counting in of the Owsley County gas, and the count-

ing out of the United Fuel gas, leave the net income mathematically about the same. What the company is entitled to get is what is "fair and reasonable."

(f) There is criticism in the appellant's brief of the trial court's statement that to ascertain the returns as after the Owsley County gas came in would demand a redetermination of the base values of a date subsequent to December, 1926. The criticism seems to rest, in major part, upon the statement in the brief that there was no material change in the rate base values as between December 31, 1926, and December 31, 1927. But the appellant stops short of the mark; for in its assignment of errors (Record, p. 103) it complains that the trial court committed error in refusing to fix the *net income* of the plaintiff as of the *contract date*, early in 1927, *the date of the bringing in of the Owsley County gas*, December, 1927, and the *date of the rate order*, October, 1929. Appellant's thought is apparently that, finding all of its proof of values addressed to what it concedes was the agreed date of December 31, 1926, it yet could thereafter, with every opportunity for fitting its operating expenses to meet its litigious desires, require of the Commission and the court that they work out their rates as of dates for which no values whatsoever were in evidence. And we happily are supported by this frank, but perhaps contradictory, statement of the brief at another point. It said that:

> "We submit that it would not be legally possible for a court to decide the validity of a legislative rate as of one date, under one set of conditions, and thus determine the validity of such a rate as applied to a later date under a different set of conditions."

It does not seem to us that the trial court, therefore, erred in its reasoning that computations of income as of different dates would need to rest upon the rate base values of those dates.

(g) Appellant's brief makes a good deal of the fact that one of the computations of return by Mr. Carter, a witness for the city, counts in the effect of the Owsley County gas, but the brief makes no mention of the counter-balancing fact. The appellant's unitary attitude of mind seems to blind it to the fact that these same identical calculations for the city always disregarded, always denied, the gas company's right to apply and charge the intersubsidiary high-cost United Fuel gas. The city should not be estopped by the fact that its witness counted in the high-priced Owsley County gas unless it be permitted to benefit from its concomitant right to count out the high-priced United Fuel gas. The city did present to the trial court, based upon the post-contract condition, the coming in of the Owsley County gas. But these same computations of result rested upon other post-contract evidence, particularized among which may be named the autonomy of gas supplies with the consequent elimination of the high-priced, intersubsidiary gas after the Columbia's purchase of the Central Kentucky, and as well the want of necessity upon the part of the company to take gas at prices higher than the market from other producers from which it was buying. Let us be fair; and reflecting about what is fair, the question is put whether, if the December 31, 1926, status is to be disregarded as on account of the Owsley County gas of December, 1927, the gas price here may be boosted for seven or eight years upon the fiction of what the Colum-

bia, as represented by the Central Kentucky, had to pay to the Columbia, as represented by the United Fuel, during only a portion of the first of these years. There can be but one answer.

(h) Mr. Kimball is brought forward to say that upon an increase of rate there would be a decrease of consumption; and that Mr. Kimball "stands unchallenged." To that we cannot agree. Mr. Kimball is challenged:

(1.) By the record. He says that an increase in rate would decrease consumption, and he puts his oath behind it. Now in 1927, when the rate was 50 cents for all the months but December, the actual gas consumption was 1,175,954 M. c. f., or as weatherized by Mr. Kimball, 1,245,568 M. c. f.; and then he says that under the 60-cent rate the consumption would be 1,152,150 M. c. f. Let us get that—he, at the increased rate for a normal year, decreases the consumption below the actuality of Mr. Kimball's abnormally warm year of 1927. Then let us envisage these facts at page 196 of the record:

At the beginning of 1927, when the rate was 40 cents, the company had in Lexington 9143 meters, or customers.

At the end of 1928, during which entire year the rate was 60 cents, the company had in Lexington 9741 meters, or customers.

The increase in meters inside the city, after the 60-cent gas was in, was 598.

Outside the city, but in the rate area here, the meters (customers) increased in the same time from 940 to 1379, an increase of 439 (Record, p. 196).

The total increase of customers under the increased 60-cent gas rate was 598 plus 439, equalling 1037.

Mr. Kimball did not supply in the record the sales for 1928. It would have given us the facts; and it was so easy a thing to do. But he gave us theory instead; and it is submitted that the increase in customers, at the end of a full year of the 60-cent gas, of more than 1000, does challenge Mr. Kimball—challenges alike the accuracy of his figures, and the processes of his reasoning.

(2.) By everything that he put into the record; and lest it be thought that we do not challenge his work, we assert now that we challenge it because it was done near a thousand miles from the things which he had never seen, about which he literally had no sort of knowledge, about banking and financial matters of which he knew nothing, and upon theories that are all as unsound as his just discussed one of decreased consumption.

(3.) He is challenged by such a typical item as this: he would charge (Record, p. 145) annually for amortization of the *Lexington properties alone* of the company, the sum of $82,477.00. Now this annual sum, compounded at 4%, would equal at the end of twenty years, $2,554,312.69, for the same properties that the trial court found to be worth $1,586,880.00 (Record, p. 83). And he would, on top of this (Record, p. 145), amortize the Lexington Utilities properties, not owned by the Gas Company, at an annual cost of $12,191.00 to the gas consumers of Lexington.

So we do challenge Mr. Kimball. We have no sort of desire to be unpleasant; but a sense of obligation to our cause compels us to speak out what is in our hearts and minds; and that is that neither the need for money

nor the desire for money can be any sort of justification for the utilization of so-called testimony of this character, alike incompetent and unreasonable. Why again should a litigant, asking relief at the hands of the court, support his case by improbable theorizing about the effect of weather conditions, and estimated increased prices upon future sales be brought into the record, instead of the actuality of sales for the year 1928? And how does this visionary theorizing accord with the fact that the number of customers at the end of the first year of the high prices had increased over a thousand? The trial court measured rather accurately this testimony and its type, though it spoke somewhat less plainly. It said (Record, p. 83):

> "Counsel devoted considerable space in their briefs to the Menifee field. The plaintiff complains that this field had a value of $2,000,000.00 as a storage plant. We are not impressed with this claim, nor can we attach great importance to much of plaintiff's evidence as to the reproduction costs new of the main transmission line. This latter evidence in some of its aspects is purely conjectural."

This $2,000,000.00 claim theorized in by the appellant's expert, but left out of the rate base by the trial court, occasions no complaint here by the appellant; so it, too, has something of our feeling and something obviously of the court's feeling that all this material was "purely conjectural."

(i) Then the appellant seeks to uphold what Mr. Kimball tried to do about the so-called "stored gas" in the Menifee field; but Mr. Tonkin, the vice-president of the Gas Company, at the foot of page 184 of the record,

says that during a certain zero time in January, 1928, the company for five days was using all the gas it could from other sources and had to withdraw gas from the Menifee field; and from that the appellant would deduce it that the company had to bring gas from other fields and pump it back into the Menifee field for cold weather conditions; but the trouble about that is that the original supply in the Menifee field never had been exhausted, was wholly available for peakload conditions, and without any pumping in of gas into that field from other sources.

(j) Something of criticism is made in the brief for the appellant because the appellees have caused to be printed this or that which the appellant would discard as immaterial. If there were inclination to make like criticism, it might be intimated, if not charged, that the expensive tabular matter of Mr. Kimball's "estimates" are an undue burden of expense and labor. But the appellees have, in the discussion in this paper, made use of all the matter that they caused to be printed, save one or two minor matters, which the appellees as well believe to be of service toward elucidating their side. These matters are:

Mr. Carter's calculation used a value of 12½ cents per thousand in his rate of return calculation. He says that that was the result of the cost per thousand for the five years preceding December 31, 1926, excluding only the United Fuel gas (Record, p. 235); and that upon his independent investigation, at the time of his testimony, the wholesale price of gas in eastern Kentucky, as actually ascertained by him, was from ten to twelve cents. In the computations in this paper we have used 13.2

cents because that was the average of Mr. Kimball's figures, excluding only the United Fuel gas; and it will be recalled that this figure is rather above the mean of the ten to twelve cents value in the field. It was thought becoming by us to put in this testimony by Mr. Carter as well to refute the more or less unfair inference to be deduced from appellant's breaking off of Mr. Carter's testimony (Record, p. 190), that he had made the calculations in a certain way because "Judge Winn asked him to," without permitting the witness to go on and make the very reasonable explanation about why Judge Winn had asked him to make the calculations on these bases. And he says that, at the top of page 236 of the record, he made his calculations upon his investigations, rather than upon any arbitrary request by Judge Winn.

On page 236 of the record the appellees caused to be put in Mr. Carter's statements that he used Mr. Kimball's own intangible values in ascertaining his rate base.

At page 237 of the record appears an excerpt from the Mt. Sterling franchise. This was put in to manifest that the new gas from Owsley County had to be spread over communities other than, and as well as, Lexington.

Mr. Hightower was the assistant treasurer of the Columbia, the Central Kentucky, and some ten other Columbia subsidiaries, and was the chief accounting officer for the Central Kentucky Natural Gas Company. At page 237 of the record he tells that the depletion item in the company's balance sheet, *supra*, of $1,662,062.69 was a "bookkeeping entry," and did "not necessarily mean that there was actually that much depreciation in connection with the property or depletion." We may well consider in this connection what was written by Mr.

Justice Brandeis, in his dissenting opinion in *Pacific Gas & Electric Company vs. San Francisco*, 265 U. S. 403; s. c. 68 L. Ed. 1075, a point not at issue with the court's opinion in that case, that,

> "If * * * the amount set aside for depreciation proves to have been excessive, the income from the surplus reserve operates as a credit to reduce the current capital charge which the rates must earn."

Now Mr. Kimball finds an actual depreciation in twenty years of only 9 per cent, and he and the trial court allow an annual charge to keep the plant in 100 per cent condition; and Mr. VonGemmigen says that his experience is that replacements offset depreciation, so that that item is no longer a factor. Yet the balance sheet of the company, as of December 31, 1926 (Record, p. 213), shows a depreciation reserve, as of December 31, 1925, of $1,456,400.65, and (Record, p. 217) the balance sheet as of December 31, 1927 (presumably related back to 1926, as the sheet [illegible] 1926, related the item back to 1925) carries a depreciation item of $1,662,062.69. That, of course, was for the company's entire properties. The trial court (Record, p. 83) found the value of all the company's properties to be $2,880,000.00. Under the reasonable statement from Mr. Justice Brandeis, just quoted, should we deduct from the entire value of $2,880,000.00 this item of depreciation of $1,662,062.69, we would have a capital base of $1,217,934.31, over all, equalling for Lexington (55%) $669,865.00. The result would be that, instead of the trial court's value of the company's properties allocable to Lexington of $1,586,888.00 (Record, p. 83) we should substitute $669,865.00; with a resultant deduction of $917,023.00, on which no return

should be allowed. While it is not thought that the court will follow these literal figures, it is thought that this relatively enormous and unnecessary depreciation fund, already built up by the company, is one of those "relevant facts" which the court must "regard" (*Bluefield Water* case, *supra*) in considering the adequacy of the net earnings to produce a fair return.

This court, in *Smith vs. Illinois Bell Telephone Co.*, 282 U. S. 133, 158, s. c. 75 L. Ed. 255, 268, has sanctioned the propriety of considering such accumulated reserves in rate-making. It wrote:

> "The recognition of the ownership of the property represented by the reserve does not make it necessary to allow similar accumulations to go on if experience shows that these are excessive."

In view of what has been manifested from the record, does not this company's experience in accumulating this reserve of $1,662,062.69, larger by $75,000.00, plus, than Lexington's allocable value ($1,586,068) of the total properties, portray a state of fact which "does not make it necessary to allow similar accumulations to go on"? And in view of them is the trial court's amortization charge of $50,000.00 justifiable?

XX

We desire to conclude this discussion with the best statement that we have been enabled to find portraying the rights of courts to interfere with rates established by local hearing authority. The court will please turn to the Eighth Circuit case of *Louisville & Nashville Rail-*

road Company vs. Railroad Commission of Alabama, 208 Fed. 35. It was before Judges Pardee, Shelby and Grubb. They wrote this:

"In deciding the question whether or not an order made by authority of the state, fixing rates, is confiscatory, the inferior courts, as to the measure of proof, are guided by well settled rules, binding on them because announced by the Supreme Court. One of those rules is that the rate fixed by legislative authority is *prima facie* fair and just. The rate having been fixed by a commission vested with legal authority, the presumption must be indulged at the outset that it is reasonable and not violative of constitutional rights. The burden of proof is placed on the plaintiff to show that the case is one calling for judicial interference with the authorized action of local authorities. *Louisiana R. R. Commission vs. Cumberland Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *Minneapolis & St. Louis R. R. Co. vs. Minnesota*, 186 U. S. 257, 264, 22 Sup. Ct. 900, 46 L. Ed. 1151. Another rule for our guidance is that the burden of proof is not only placed on the plaintiff but that the plaintiff is required to do more than offer a mere preponderance of evidence. The judiciary is not permitted to interfere with the rates established by legislative authority unless it is made to appear clearly and beyond reasonable doubt that they are unreasonable and that their enforcement would be equivalent to the taking of property for public use without just compensation. If the evidence offered leaves the court in doubt, if it is not clear, satisfactory, and convincing, the rate fixed by state authority should not be enjoined. *San Diego Land Co. vs. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; *St. L. & San Francisco Ry. Co. vs. Gill*, 156 U. S. 649, 666, 667, 15 Sup. Ct. 484, 39 L. Ed. 567. So stringent are these rules against the interference with the action of

> the local authorities in fixing rates that it has been said that the court should not enjoin a rate unless it can hold 'that it was impossible for a fair-minded board to come to the result which was reached.' *Knoxville vs. Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 153 (53 L. Ed. 371).
>
> These rules are not mere cautionary phrases. They are intended to mark the limits of judicial interference. If the inferior courts will regard these principles, not as platitudes, but as rules prescribed for their guidance, it will greatly lessen legislation and litigation in relation to the regulation of the tariffs of public service corporations."

Next we bring attention to the company's proof, the statistical matter prepared by Mr. Kimball, at the following pages in the record. Table 134 is an "estimate." The one at page 135 is an estimate. The one at page 136a is an estimate. The one at page 138a is an estimate, in that it assumes what the gas consumption would be if the temperature were otherwise. The one at page 138b is an estimate. The one at page 139 is an estimate. The one at page 140 is an estimate. The one at page 141 is an estimate, so those at 142 and 143 and 144. The one at page 153 brings out its percentage results on Kimball's estimated cost of reproduction. The remaining of his tables are his theoretical "reconciliations" of what the company's actual figures are to what he conceives they ought to be. His table at page 172 is remarkable indeed in that it emphasizes the point hereinbefore made, how he would have the consumption and profits both decrease at the high rate, when as a matter of fact the number of consumers increased over a thousand in the two years disclosed to us in which there were higher

rates. Is it beside the mark, in view of these invasions of the wide field of supposition, to say what this court said in the *Minnesota Rate* case, in these words;

> "The cost-of-reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it does not justify the acceptance of results which depend upon mere conjecture."

CONCLUSION

In a rate case there is no orderly sequence of events such as underlie the ordinary litigation. There are no opening event, no series of facts that may be related by witnesses, no breaking off at the end, and no beginning of a law suit. The preparation of a brief, therefore, is not a particularly happy work; and when it is completed it leaves, with the compiler of this one at least, a sense of rather rough accomplishment. In addition it has had to be prepared under a brevity of time, due to the wholly unexpected early assignment of the case. We submit the controversy to the court, emphasizing again the insistence that the trial court had not the right to take the case from the due process body, the Railroad Commission of Kentucky, for any other purpose than to ascertain whether the rate emanating from that body came without any testimony and without any reasons behind it. But if this court should believe that the trial court was within its proper province in doing what it did, then we submit that the trial court's decree, the leaving in effect the 45-cent rate of the Railroad Commission, was

justified alike upon the trial court's treatment of the matter and for those reasons herein suggested, other than those employed by the trial court.

Very respectfully,

ROBERT H. WINN,
C. M. HARBISON,
BAILEY P. WOOTTON,
S. H. BROWN,
Attorneys for the Appellees.

IN THE

Supreme Court of the United States

No. 779. In Equity.

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Kentucky

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REPLY BRIEF FOR THE APPELLEES

ROBERT H. WINN, *Mt. Sterling, Ky.,*
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Save for the matter set up in Point II, this brief is a condensation and restatement for accuracy of what is said in the original brief..... 1

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IN THE

Supreme Court of the United States

No. 779. In Equity.

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

vs.

RAILROAD COMMISSION OF KENTUCKY ET AL.,
Appellees.

REPLY BRIEF FOR THE APPELLEES

Before going into their reply brief, appellees desire to direct the concentrated attention of the court to certain figures in the record, so obvious and so convincing as that the failure of appellees' original brief to discuss them is embarrassing. Will the court please turn to page 116a of the transcript? It is the work of appellant's expert, Mr. Kimball.

Let us go to the next to the last column on that sheet. Mr. Kimball's oath is that the company, selling gas in 1926 at 40c, had a net operating revenue, for amortiza-

tion, depletion, extraordinary maintenance and dividends, of $196,232.00. From that we may deduct the $75,263.00 allowed by the trial court for amortization and extraordinary maintenance (the figures are in the opinion, but are more succinctly collated at page 41 of appellant's main brief); and we have left for dividends, $120,969.00. But that is only a part of it; for this calculation by Mr. Kimball *is on gas sold at 40c.* Now the sales rate fixed by the Commission, and left in effect by the decree below, is *45c.* So, going to the top of this same column, and finding that gas sales at 40c realized income of $522,349.00, we at once perceive that the same gas sold at 45c would have realized ⅛ (5c=⅛ of 40c) more; and ⅛ of $522,349.00 is $65,293.00. So for 1926, as on Mr. Kimball's own figures of income, but adjusted to the 45c price of the Commission, and the trial court's ascertainment of charges before dividends, we have this result:

Amount available for dividends, *supra*.	$120,969.00
Plus 5c increase by the Commission.....	65,293.00
Net for dividends.....	$186,262.00

This figure is Mr. Kimball's figure, modified only by an inexorably correct 5c per M. addition to income, to conform the sale price to the 45c of the decree. Mr. Kimball (Tr. p. 111) says he took these figures from "operating reports of the Central Kentucky Natural Gas Company." Now let us note:

(a) The trial court, from its own deductions from the record, found a net income available for return in 1926, of $144,574.00 (Tr. 89).

(b) But there was all the while in the record, the actuality from the company's own books.

(c) This actuality of net income thus apparent for 1926, was $186,262.00, based upon a 45c rate.

(d) $186,262.00 is near 8½% on the trial court's rate base value (Tr. p. 83) of $2,198,107.00.

(e) The trial court's allowance for amortization, extraordinary expenses, etc., the $75,263.00 of this calculation, is accepted by appellant. Its main brief (p. 12) says "no complaint is made by appellant of these findings."

(f) The appellant (its main brief, p. 12) likewise avowedly makes no complaint of the rate base of the trial court.

(g) So on figures that are acceptable to appellant, and on its own actual experience, as taken by its own report from its own books, the agreed year of 1926, with gas selling at 45c, produced it 8½% of income.

Note again, please, these are the appellant's own figures of income. They are the trial court's figures of amortization, and extraordinary upkeep, by appellant's specific statement not the subject of complaint. When these figures of its own experience were copied from the company's books, and when they were put into the record by appellant's expert, they were designed to manifest a pitifully inadequate income; for the appellant (see its Bill of Complaint, Tr. p. 16) then asserted that the properties utilized by it for Lexington were worth $6,340,895.00, as of December 31st, 1926, those very same properties valued as of the same date by the court at $2,198,107.00 (Tr. p. 85); and "no complaint is made of this finding," says the appellant's brief, at p. 12. The

appearance of the figures now is probably inadvertent; for they pretty well go to the demolition of appellant's case.

We are not unmindful that the figures are on gas costs to appellant before it began to buy the high priced Owsley County gas, but it was as well before other compensating high priced gas went out of the picture, all of which appears at length on pages 43-4 of our main brief. And again, and always, it is to be remembered that appellant (though it now protests the fact) asked the trial court (see the quotation from its brief at pages 41-2 of our main brief) to accept this December 31, 1926, date for its decision. And again, and always, it is to be remembered that the trial court (Tr. p. 90) wrote this:

> "Upon the hearing of this cause the parties requested the court to fix the base value of plaintiff's properties allocable to Lexington as of December 31, 1926, and determine whether the rate established by the Commission *is a reasonable rate on such values as of said date.*" (Italics ours.)

So it is submitted that upon a rate base acceptable to appellant, its own exhibit of its general operating costs from its own books, allowances for amortization and upkeep as well acceptable to it, it actually and mathematically earned in 1926, upon gas sales computed at the decretal rate of 45c, the sum of $182,262.00, near 8½% on the rate base.

We might well content ourselves with the foregoing exact demonstration from the record. But the appellant's reply brief, in its opening, says that its authors have difficulty in following the reasoning of, and in dis-

covering the relevancy of the authority cited in, our brief in chief. We realize that so critical a statement would not have been made without something of justice behind it. At any rate, it moves us to simplify, and to concentrate the quantity (at least) of, our main brief, and to endeavor to clarify what we endeavored to say in our main paper.

First. This suit, brought in the District Court, attacks a natural gas rate fixed upon full hearing and trial by the Railroad Commission of Kentucky, a constitutional body, empowered to hear and fix rates. Let us go to appellant's own bill to find portrayed the events before the Commission; and here is what the bill says (Tr. p. 5):

> "Said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants and this company, and said case was submitted on the pleadings, proof and exhibits introduced by the parties thereto, * * * and written briefs were thereafter filed by the respective parties."

And further (Tr. p. 12 and following, from the bill) that the Commission found

> "that a flat rate and charge of forty-five (45c) cents per thousand cubic feet * * * is a fair and reasonable rate and charge."

Our relevant reasoning is that such a trial, such a hearing, as are thus expressly asserted by the appellant to have been had by it before Kentucky's constitutional rate-making body, afforded it due process of law. And a rate decision emanating from that trial cannot be a

taking without due process of law. This court has considered heretofore whether hearings before this same Kentucky Railroad Commission afford due process. It has answered the question affirmatively no less than thrice. Will the court please refer to these cases, and our main brief's discussion of them, at pages 18 to 22?

Louisville and Nashville Railroad Co. vs. Finn et al., as the Railroad Commission of Kentucky, 235 U. S. 601, s. c. 59 L. Ed. 379.

Louisville and Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298.

Louisville and Nashville Railroad Co. vs. The Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229.

Now, however much of merit there may be in the appellant's claim of inability to follow the reasoning of the appellees, it surely should be easy for it and its counsel to understand what the court wrote in the cited cases dealing with the due process nature of rate decisions by that same Kentucky Railroad Commission with which it deals here. What the opinions say on the subject is set out at pages 18 to 22 of our main brief. Will the court please turn to these pages? What the opinions seem to us to say, and what, mincing no words, they do say definitely, exactly, clearly, is that hearings like this one before the Kentucky Commission are due process hearings. Our *sequitur* is that the three-judge court, in trying this case *de novo*, did what it had no right to do. It substituted without right its own views upon fair rates for those of another due process body, rightfully arrived at.

Second. Appellant comprehended the foregoing. It knew it could not get away from the Commission's due process rate, duly arrived at; and by an amendment (Tr. p. 59) it charged that the Commission's decision "was capricious, arbitrary and without any evidence * * * to support the same." (Cf. the fullness of the hearing as set up, *supra*, from appellant's original bill.) And upon this second point we submit:

(a) That the courts of the land are at liberty to supplant with their own views those of that due process body, The Kentucky Railroad Commission, *when, and only when,* the decisions of that due process body are without reason, and are wanton, capricious and arbitrary. Here is the authority for that statement, discussed more at length at pages 7 to 15 of our brief in chief:

Louisville and Nashville Railroad Co. vs. Kentucky, 183 U. S. 503, s. c. 46 L. Ed. 298.

Louisville and Nashville Railroad Co. vs. Garrett et al., as the Railroad Commission of Kentucky, 231 U. S. 298, s. c. 58 L. Ed. 229.

Kansas City Railroad Co. vs. United States, 231 U. S. 423, s. c. 58 L. Ed. 296.

Railroad Commission vs. Cumberland Telephone and Telegraph Co., 212 U. S. 414, s. c. 53 L. Ed. 577.

Interstate Commerce Commission vs. Union Pacific Co., 222 U. S. 541, s. c. 56 L. Ed. 308.

People ex rel. New York and Queens Gas Co. vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337.

Interstate Commerce Commission vs. L. & N. Railroad Co., 227 U. S. 88, s. c. 57 L. Ed. 431.

But perhaps it will be easier for the appellant to follows the court's own words; so we quote this from the *New York and Queens Gas Co.* case, just *supra*:

> "The action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence, and therefore * * * even if the courts differed with the Commission as to the expediency of the order, they are without authority to substitute for its judgment their views of what may be reasonable and wise."

And again, the following reasoning from the last case cited, *supra*, is assuredly easy to follow:

> "The order of the Commission * * * was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body."

(b) That the appellant, in all that it has said here, and in all that it said and did before the three-judge court, has manifested nothing of meretriciousness in the Commission's decision. So we submit that neither the trial court, nor this court, is at liberty to substitute its own conclusions for those of Kentucky's constitutional Railroad Commission, arrived at in the exercise of a due process hearing; and that the Railroad Commission's ascertainment of a fair rate of forty-five (45c) cents

must stand unless this court, searching the record, finds that the Commission acted without evidence, and without reason; and that, it is respectfully submitted, the court can find no such thing in the narrow record that appellant, in the exercise of its unlimited right, has brought here. Appellant should not have difficulty, it would seem, in perceiving alike the sound reasoning and relevancy of this authority.

In this aspect of the matter the trial court erred, we respectfully submit. The trial court wrote (contrary to what is argued here) that the courts were at liberty to consider this *Kentucky Commission rate case de novo;* and it cites the *Ben Avon* case from the Supreme Court and the *Greenbrier* case from the Kentucky Court of Appeals, apparently in conflict with what this court had written in the several cases involving the due process nature of hearings before the Kentucky Commission. We will discuss these two cases shortly. So it may be that the court here will find it desirable, and we press upon the court how the right to a fair comprehension of its intent makes it necessary, to put at rest the supposed conflict; and to say whether a rate litigant, who has under a statute, or by agreement (Franchise Sec. II, Tr. 32), submitted its case on pleadings, evidence, argument and free hearing, to that due process body, the Railroad Commission of Kentucky, finding itself displeased with its result there, has a right to the independent and *de novo* judgment of the District Court.

There is *apparent* conflict in what the court has written. But when fair reason comprehends *all* that has been written; it finds that there is no conflict. In parallel columns we juxtapose the apparently conflicting rulings:

In *L. & N. Railroad Co. vs. Kentucky,* 183 U. S. 503, s. c. 46 L. Ed. 298, it is said:

"We are not prepared to accept the view that the Railroad Commission, in acting under Section 218, is merely an administrative body, and as such, subject to judicial review. It is rather a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the Commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the Commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing

In *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 287, s. c. 64 L. Ed. 908, this is said:

"The order here involved prescribed a complete schedule of maximum future rates and was *legislative in character.* In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause." (Italics ours.)

> is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them, whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud, or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

Now many brief-writers, and not a few judicial ones, have unthinkingly seized upon this *Ben Avon* case as determining that *in every rate case,* the parties were entitled to a review in court. It decides no such thing. It was written upon a rate *"legislative in character."* Of course a *legislative* rate is open for admeasurement by the courts; for *legislation* affords no due process. And equally of course this *Ben Avon* case does not rule it, nor even hint it, that a rate arrived at upon full hearing, upon argument, upon evidence, even though it be by a body not called a "court" is *ex necessitu* wanting in due process. Let us recall again that the appellant (Tr. p. 5) says of the instant proceedings before the Railroad Commission of Kentucky:

> "Plaintiff says that said complaint was duly heard by said Railroad Commission under and by proper pleadings, and testimony and evidence was introduced and offered by both the complainants and this company, and said *case* was submitted on the pleadings, proof and exhibits * * * and written briefs were filed by the respective parties,"

and that (Tr. p. 12) the Commission thereon fixed the 45c rate. Was that rate a *legislative* rate? If it was, then the *Ben Avon* case rightly demands a hearing, a precedent due process; but if it were a rate arrived at by decision, and upon the formality of hearing portrayed by appellant, then, as within the very words of this court, due process was afforded by this hearing by the Kentucky Commission. The distinction is too obvious to require further elucidation. It will be a fortunate thing when this court has clarified the two diametrically opposite conditions, and has set the interested profession, and the subordinate judiciary, upon the right footing. We invite the court to go over the cases cited, and the quotations made from some of them, in point II, at pages 16 to 24, inclusive, of our brief in chief. To the cases there cited we add these:

People ex rel. New York and Queens Gas Company vs. McCall, 245 U. S. 345, s. c. 62 L. Ed. 337.

Interstate Commerce Commission vs. L. & N. Railroad Company, 227 U. S. 88, s. c. 57 L. Ed. 431.

New York Central Railroad Company vs. White, 243 U. S. 188, s. c. 61 L. Ed. 667.

Crane vs. Hahlo, 258 U. S. 142, s. c. 66 L. Ed. 514.

Silbershine vs. United States, 266 U. S. 221, s. c. 69 L. Ed. 256.

Virginian Railway Co. vs. United States, 272 U. S. 658, s. c. 71 L. Ed. 463.

Hardware Dealers Mutual Fire Insurance Co. vs. Glidden Co., 284 U. S. 151, s. c. 76 L. Ed. 214.

Dohany vs. Rogers, 281 U. S. 362, s. c. 74 L. Ed. 904.

Insofar as extend the range and power of our minds to comprehend them, these cases seem to be sound footing for the theory that this hearing, as portrayed by the appellant's bill, before Kentucky's constitutional due process body, constituted a due process hearing. We are aware that the trial court and the otherwise unexplained and unlimited application of the *Ben Avon* case are to the contrary. We submit that our viewpoint is sound, and that the courts have no sort of right to try again what has been duly and constitutionally tried by other tribunals set up, whether by state or federal law. But if we be wrong in this concept, we respectfully ask that the court set us right, and numberless members of the profession right, upon the subject.

And let us, once and for all, get it clear about the Kentucky case of *L. & N. vs. Greenbrier Distillery Co.*, 170 Ky. 775, the case relied upon by the lower court, and militantly relied upon by appellant here, as establishing a right to the *de novo* conclusions of the court. The opinion is long. It is more discursive than it is understandable. Appellant and the trial court overlook it that

it was written, not upon a primary rate hearing such as this, but under Section 829 of the Kentucky Statutes, *a section restricted to awards on excess charges, a section expressly providing for a court review.** The difference between Section 829, considered in the *Greenbrier* case, and Sections 201e-1 *et seq.* of the Kentucky Statutes, under which was held the rate hearing here, is patently obvious. Under Section 829 the Commission hears complaints about *past* "extortions," "discriminations," and "preferences." If it finds that there have been infractions of the statutes against these practices, it renders awards accordingly. But naturally no coercive writ can issue upon such awards; and accordingly the statute provides for actions in court to enforce the payment of the reparation awards. Upon the contrary, Section 201e-5

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*Section 829, Kentucky Statutes, runs thus:

"The (Railroad) commission shall hear and determine complaints under K. S., Sections 816, 817 and 818. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases, against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases."

of the statutes,* that section under which the Commission acted in the instant case, covers hearings upon *future* rates, held upon pleadings, evidence, argument and decree, or order without any provision for court review. And the Kentucky court's animadversions in the *Greenbrier* case to the right of a court review were *upon a statute providing for such review.* They never touched upon the idea invoked by appellant. Let us be rid of the trial court's and appellant's cloud about the case; and on the subject of due process, the *Greenbrier* writer is clear enough. He writes, at page 791, that "'due process' is always had when the party has had sufficient notice and an opportunity to make his defense." But what was fundamental in the writer's mind emerges at page 791, where he says:

> "If the rate fixed is so low as to be confiscatory, the carrier may * * * have a review of the proceedings by a court, and if the action was based upon insufficient evidence and was thus arbitrarily done, it has its remedy."

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* Section 201e-5 of the Kentucky Statutes is as follows:

"Whenever a duty or obligation is imposed upon any company mentioned in this act by law which relates to the rates, tolls, fares, classification, charges, service, rules, regulations or practice of any such company, or whenever a complaint is filed alleging a violation of this or any other law relative to such company, the same shall be under the supervision and regulation of the railroad commission which shall have authority, after due notice and hearing as provided by law, to issue an order fixing just and reasonable rules or regulations or practice to be thereafter followed, and to prescribe the rate or toll to be charged or service to be performed thereafter to relieve any undue or unreasonable discrimination, prejudice or advantage found to exist in violation of law; and such rates, classifications, charges, fares, tolls, rules, regulations or practice so ordered shall be substituted for the rates, classifications, charges, fares, rules, regulations or practice then in force by any such company, and power is by this act conferred upon said commission to make and put into effect joint rates."

The writer evidences that he had read this court's three Kentucky Commission opinions, and that he was in accord with them. He meant that the courts had jurisdiction when the decisions of the Commission were so unsupported by evidence as to be arbitrary. This has been this court's position. It is our position.

Third. Appellant's reply brief does not answer, does not undertake to answer, the *calculations* submitted in appellees' brief in chief. It notices them; and at the same time it categorically declines to answer them. Its assigned reason for not answering them is that the appellees may not be heard without a cross appeal. It persists in the fallacy, in the face of this, written in *Langnes vs. Green,* 282 U. S. 531, s. c. 75 L. Ed. 520:

> "But it is likewise settled that the appellee may, without taking a cross appeal, urge in support of a decree any matter appearing the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."

The court will find the point elaborated at pages 3 *et seq.* of our main brief, where other cases supporting the doctrine are cited. For the sake of concentration we reiterate here our argument. It is that the philosophy of *Langnes vs. Green,* and the other like cases, is sound. That philosophy is not that an appellee may, without cross appeal, *reach any result other than that of the decree.* On the contrary, it is that the appellee may reach the *same* result as that of the decree, though he may reach it by different mathematics, or a different process of reasoning. In so doing, the appellee argues not in opposition to the decree, but in support of it. And it is

rather absurd (we mean no offense by the use of the word) to argue it that we must take out a cross appeal in order to *sustain* the decree of the trial court. The appellant seeks to alter the trial court's decree in its declination to enjoin the 45c rate of the Railroad Commission. The appellees are not contesting that decree. And, in common sense, no cross appeal upon their part is required to permit them to sustain the 45c decree, though their "argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it." It is their point that the court erred in its reasoning in allowing the amortization charge of $60,000.00 per year; and it is their argument that if this unwarranted charge had been eliminated, the 45c rate of the Commission would be the rate of the court's decree, the same 45c rate which the trial court declined to enjoin.

It is, as well, their point that the trial court ignored the rule that the decisions of the Kentucky Railroad Commission are due process decisions, not to be supplanted by the court's views, unless and until the courts shall have found these decisions to be arbitrary and without evidence. That process of reasoning, as well, supports the decree of the trial court. And the reply brief for the appellant does not mention *Langnes vs. Green*, nor *U. S. vs. American Railway Express Company*, 265 U. S. 425, nor *United Railway and Electric Company vs. West*, 280 U. S. 234, all of which are in the face of the appellant's contention.

It should not be difficult, it would seem, for appellant to understand this argument, nor to appreciate the intent of *Langnes vs. Green*.

Fourth. The trial court, supplanting the views of the due process Commission by its own views, found that a fifty (50c) rate was fair; but it conditioned the granting of an injunction against the Commission's forty-five (45c) cent rate upon appellant's consenting to the court's 50c rate. The condition was rested upon the equitable maxim that he who seeks equity must do equity. And on this it is submitted:

(a) That the trial court, under the authority *supra,* had no right to exercise its own faculties upon reasoning out any 50c, or other, rate, until and unless it found the Commission's act to have been wantonly disregardful of the record.

(b) And that if it had such right, it had the further right, at one and the same time, to do justice and concomitantly to exact justice. This rate case had been pending more than five years. The ultimate right to several hundred thousand dollars of impounded money awaited the case's end. The trial court felt that there should be an end to it. These authorities support the application of the named maxim in rate cases:

Public Service Railway Co. vs. Board, 276 Fed. 979, 990, a three-judge case from New Jersey.

City of Toledo vs. Toledo Railway & Light Co., 259 Fed. 450, 458, C. C. A., 6th Cir.

Consolidated Gas Co. vs. Newton, 267 Fed. 231, D. C. S. D., N. Y.

Newton vs. Consolidated Gas Co., 258 U. S., 165, s. c. 86 L. Ed. 538.

In the Sixth Circuit *Toledo* case (this case is from that circuit) the court, composed of Judges Warrington, Knappen and Denison, wrote this:

> "It is likewise plain that, when an injunction is asked to restrain the enforcement of an unreasonable rate, the court may make its order conditional upon the doing of equity by plaintiff to consent to charge no more than what seems to the court to be reasonable."

It should, it seems, be easy to follow the reasoning, and to discover the relevancy, if not of the discussion, at least of the authority. The appellant declined to accept the too generous condition of the court.

Fifth. The condition was too generous. The trial court (Tr. pp. 87-8) in its opinion made these annual allowances as deductible by appellant each year before income:

(a) Fifty thousand ($50,000.00) dollars per year for amortization of its own properties.

(b) Ten thousand ($10,000.00) dollars per year for amortization of the Lexington Utilities distribution system *leased by,* and *not owned by,* the appellant (see leasing contract printed in a separate pamphlet as an *addendum* to the transcript, pages 267-273).

(c) Ten thousand ($10,000.00) dollars per year for extraordinary upkeep of appellant's property over and above all proven past experience of the amount necessary for upkeep.

(d) Five thousand ($5,000.00) dollars per year for the like upkeep of the distribution system, leased but not owned by appellant.

The total of these annual allowances is seventy-five thousand ($75,000.00) dollars. With all due respect we submit that, and we submit that the record sustains us in the charge that, not one dollar of this sum is sustainable by the record. We take up the four items:

Upon (a). The trial court allowed this $60,000.00 for amortization upon the assumption, the pure assumption, without one word of proof behind it (for this charge of an actuality see our main brief, pp. 69-70) that appellant's gas supply would be exhausted by January, 1947, the end of the franchise contract. It allowed it in the face of appellees' proof, *absolutely the only proof in the record on gas supplies,* of a hundred years' available supply, and in the face of a map (the map is filed here) of the Columbia's own printing, showing that all the parent Columbia Company's inexhaustible West Virginia and Kentucky supplies had direct delivery connections with the Lexington vents. It allowed the charge upon the assumption that the transportation and distribution lines would be valueless at the end of twenty years, in the face of a provision in the franchise contract itself for the substitution of artificial for natural gas. It allowed it without even speculation behind the allowance. It just allowed it. Appellant rests here upon this fifty thousand ($50,000.00) dollar annual allowance to retire at the end of the franchise, at its full rate base value, its own property then and now in perfect condition. And it introduced no word, no expert, no hint, to justify the allowance. Literally, absolutely, exactly, it introduced not one word of proof about gas supplies. Circumstanced as it was with unlimited supplies at its command, it may be that it dared not submit the facts.

On no other conceivable ground can its silence be explained. This court, in *Knoxville vs. Knoxville Water Company,* 212 U. S. 1, s. c. 53 L. Ed. 371, said this:

> "If a company of this kind chooses to decline to observe an ordinance of this (rate) nature, and prefers to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would be so confiscatory in its effect as to violate the Constitution of the United States."

And in the recent *Los Angeles* case, 289 U. S. 287, this is said:

> "The question is whether the rates are confiscatory. And upon that question the plaintiff has the burden of proof."

It is fair to assume from its silence that, in the quoted words from the *Knoxville* case, it was not "prepared to show" any possible or probable gas exhaustion.

Upon (b). Why should the appellant be permitted to amortize the value of a plant which it does not own? Is not ownership a fundamental for amortization? Should the Lexington plant be wholly useless at the end of the franchise because of any fancied and fanciful exhaustion of gas, the appellant would be nothing out of pocket. The loss would be that of the Lexington Utilities Company owning the plant, not that of the appellant, without a penny of ownership in it. Is it worth while to argue further that there is no justice in amortizing to appellant the value ($611,227.00, Tr. p. 84) of something of which it owns not a farthing?

Upon (c). Mr. Kimball's table, at page 116 (a) of the transcript, shows the actual expenses of the company for upkeep. The trial court allowed them. On top of them it allowed $10,000.00 more. It allowed it in the

face of appellant's witness, Mr. Von Gemmigen, who says (Tr. p. 228) that "maintenance offsets depreciation," and in the face of Mr. Kimball's statement (Tr. p. 227) that "taking the property as a whole, it remains in practically the same condition from year to year by reason of the replacements and extensions, that is, the expenditures made upon it during the year." So it does not seem to be just to allow $10,000.00 annually for extraordinary upkeep upon a property already kept in perfect condition by the ordinary upkeep allowances.

Upon (d). If it were conceivable that the like extraordinary allowance could possibly be justified as upon the leased properties, will the court please observe, in the pamphlet addition to the transcript, how at pages 271-2, the lessee, the appellant, is given each year, in its rental payments to the lessor company, a credit of $10,000.00 to cover, *inter alia*, "the care, supervision and maintenance of the plant," an allowance nowhere taken stock of in the calculations of the trial court?

Here is the mathematical result:

$75,000.00 per annum is 5 7/10 cents per thousand upon the 1,300,000 M. c. f. (Tr. 136b) sold in 1926. It is near 6 4/10 cents per thousand on the 1,175,954 M. c. f. (Tr. 136c) sold in 1927. 5 7/10 cents deducted from the trial court's 50-cent rate results in a rate of 44 3/10 cents as just for 1926. 6 4/10 cents deducted from the court's 50-cent rate results in a rate of 43 6/10 cents as just for 1927. Both are substantially below the 45c of the Commission.

It would seem that the appellant should not find difficulty in following this reasoning, or in discovering its relevancy.

There is yet another and complete reason against the allowance of any part of this amortization charge:

When first, after its purchase of the Central Kentucky Company, the bookkeeping methods of the Columbia Company were applied to the Central's books (testimony of Assistant Treasurer Hightower, Tr. 237), it was disclosed that the appellant had built up a fund of $1,662,062.69 (see balance sheet, Tr. p. 217), denominated by the Columbia as "Renewals, Replacements, and Depletion." It is fair to assume that as of December 31, 1927, this built-up "Depreciation" fund related back to December 31st, 1926, as the December 31, 1926, balance sheet (Tr. p. 213) expressly related back to 1925. And applying to the "Renewals, Replacements, and Depletion" the same terminology applied by appellant as of December 31, 1926, the "Depreciation" item amounts to $1,662,062.69, as by the appellant's own balance sheet records.

The trial court gave no consideration whatsoever to this record fact. It allowed an annual charge of $60,000.00 to amortize completely the entire Lexington value of the Gas Company's own and its leased properties, *overlooking in entirety* the existence of this depreciation fund already built up by the company at the expense of its customers, substantially equal to the entire rate base value ($1,586,880, Tr. p. 84) allocable to Lexington, a value of which the Gas Company makes no complaint here. So the effect of the annual charge, if it were otherwise permissible, is to let the Gas Company doubly amortize its property, already amortized, or depreciated, by a reserve of $1,662,000.00, and as well, kept by an extra annual expense allowance at 100% condition.

In *Smith vs. Illinois Bell Tel. Co.*, 282 U. S. 133, 158, s. c. 75 L. Ed. 255, 268, and in Mr. Justice Brandeis' dissent in *Pacific Gas & Electric Co. vs. San Francisco*, 265 U. S. 403, s. c. 68 L. Ed. 1075, and in *Los Angeles Gas & Electric Corp. vs. Railroad Commission* (May 8th, 1933), it is recognized that, while "the company's depreciation reserve could not be used to support the imposition of a confiscatory rate," the fact of the existence of the accumulated reserve "did not make it necessary for the Commission to make an annual allowance which in the light of experience would be excessive" (quoted from the *Los Angeles* case, 289 U. S. 287).

Again: this "Depreciation Fund" of $1,662,062.00 had already been built up by the appellant before the very beginning of the twenty-year franchise involved in this litigation. Let us put out this sum at 4% compound interest (the rate of the trial court, Tr. p. 83, not complained of by appellant) for the twenty years of the franchise; and since $1.00 at 4% compound interest for twenty years equals $2.191, then $1,662,062.00, multiplied by that factor, will equal at the end of that time, $3,641,577.84. Now, the total value of *all* (not the 55%, plus, allocable to Lexington) appellant's properties, as fixed by the trial court (Tr. p. 83), is $2,880,000.00. The appellant expressly accepts that value. The total value of the Lexington Utilities Company's properties, as fixed by the trial court (Tr. p. 84) is $611,227.00. That is the value of appellant's expert Kimball; and appellant accepts that value. The total of both values (and not just Lexington's portion) is $3,491,227.00, a sum less by $150,350.00 than the appellant's self-declared depreciation fund (already built up at the beginning of the

twenty years) will amount to at 4%, compounded, when the franchise ends. And when it ends, the appellant will yet have its property, in excellent condition, to supply its already owned abundant commodity to the citizens of Lexington, under its perpetual lease of the Lexington Utilities Company's perpetual right to distribute gas there.

In view of the $1,662,062.00 of depreciation reserve, and of these reflections about it, it is submitted that the allowance of the $60,000.00 per annum for amortization is excessive as to every dollar of it.

It would seem that this is both relevant and comprehensible.

Sixth. Appellant manifests a good deal of needless solicitude over the date (December 31, 1926) as of which the trial court reached its conclusion. Appellant invited, in direct, clear and exact words, the court to use that date, and its subsequent complaint is not to be justified, we submit. Naturally, the date, in a world of fast-changing conditions, is relevant. So let us, as briefly as may be, consider this subject of the time.

The franchise contract was made in January, 1927. Each side, in the preparation of the case, naturally addressed its basic annual proof to the year just ended on December 31st, 1926. Note, please, these facts:

(a) Appellant's expert, Kimball, made up his complete reproduction and operating expenses as of that year.

(b) Appellant's bill (Tr. p. 16) twice says that December 31st, 1926, was "the day certain in this case"

(c) The date was adopted at the invitation of the

parties, if we may rely upon the trial court's explicit statement. The opinion (Tr. p. 84) says that "both parties desired the valuation to be fixed" as of December 31st, 1926; and that "we are asked to fix the rate base and determine the income as of December 31st, 1926."

(d) The trial court, questioned upon the accuracy of this statement, reiterated and emphasized it, in its response (Tr. p. 28) to a petition for rehearing, thus:

> "The parties requested the court to fix the base values of plaintiff's properties allocable to Lexington as of December 31, 1926, and determine whether the rate established by the Commission aforesaid is a reasonable rate on such values as of said date."

(e) It would seem that the trial court was exact in its reiterated statement. It had before it the Gas Company's brief. A copy of it is filed as an appendix to our brief in chief. At pages 65 *et seq.*, of that paper, appear these words from the Gas Company:

> "We desire to direct the attention of the court to the fact that both parties have by common consent adopted December 31, 1926, as the date on which the value of the used and useful property should be ascertained, that being the nearest convenient and practicable date to the contract date. * * * *It is inherently necessary that the just and reasonable rates and charges must be as of the contract date.*"

The court will please read *in extenso*, what more was said by the Gas Company, at pages 41-2, of our brief in chief.

Faced by these words of its own, the Gas Company, by a good deal of argument, longer indeed than plaus-

ible, would have it that the trial court should not have done the exact thing that appellant's own words asked it to do.

It should not, it seems to us, be difficult for the appellant to follow and discover the relevancy of the December, 1926, date. The matter is discussed in detail at pages 27 to 43 of our brief in chief. Nor should it be thought irrelevant that we should ask that the Gas Company be estopped by, be held to, what it asked of the trial court. See *Davis vs. Wakelee*, 156 U. S. 680, s. c. 39 L. Ed. 578.

Seventh. But out of an instinctive following of the path that the trial court and the appellant advisedly, deliberately, and definitely took down until the case had been decided, we are all unduly exercised about this date; *for if a later date be taken, the results will not be different.* So let us go into that:

(a) The Gas Company now wants a later date because, in November, 1927, following the January contract, it began to buy for distribution a considerable quantity of what is known in the record as the Owsley County, or Petroleum Exploration, gas at a cost to it of forty (40c) cents per thousand; and its grievance now is that the trial court did not consider this higher gas cost expense in its adoption of the requested date of the prior December 31st. The opinion below remarks (Tr. p. 85) how, asked to decide as of December 31st, 1926, it must decide on the then conditions. That seems tritely just. But, if it were otherwise, and if the figures had been made up after the Owsley County gas came in, the Gas Company would gain nothing. Why? *Because contemporaneously other high-priced gas went out.*

When the Owsley County gas came in, the other chief source of supply of the appellant was the United Fuel Gas Company, which was a one hundred per cent subsidiary of the Columbia Gas and Electric Corporation. And in the same November, 1927, of the coming in of the Owsley County gas, the Columbia (Tr. p. 208) bought the appellant Central Kentucky Company. So after November, 1927, the Columbia was both the buyer and seller of this other high-priced gas. And appellant now seriously seems to contend that it has the right (a) to a rate increased by the coming in of the Owsley County gas, and (b) that, at one and the same time, it has the right to include in its expense charges the high-priced gas that it was buying from itself. It would eat its cake and have it, too, notwithstanding that this inter-company fictional charge has been denounced by every court that has dealt with the matter. Among other such thumbings-down is the recent Kentucky natural gas case of *United Fuel Gas Company vs. the Railroad Commission of Kentucky*, 278 U. S. 300, where it is said:

> "A public service corporation may not make a rate confiscatory by reducing its net earnings through the device of a contract unduly favoring a subsidiary."

The litigants in the quoted case were the United Fuel Gas Co., owned by the Columbia, just as the appellant here is owned, and that same Kentucky Railroad Commission, the work of which is under assault here.

And just why and how, in the face of *Western Distributing Company vs. Public Service Com. of Kansas*, 285 U. S. 119, s. c. 76 L. Ed. 655, the appellant yet contends that it has the right to charge this inter-subsidiary

high rate, without evidence of its propriety and fairness, is, in the words of small Alice, "curiouser and curiouser."

The result of counting in the post-contract Owsley County gas, and counting out other high priced gas which the appellant, with its post-merger abundant Columbia supplies, was under no obligation to buy, is calculated out at pages 57 to 59 of our brief in chief. They demonstrate that the appellant would be hurt, not helped, if it secured now, contrary to its position below, the post-contract conditions of November, 1927, and later. The relevancy of this observation seems obvious enough.

Appellant, at page 21 of its reply brief, quotes our brief below to show that it included Mr. Carter's calculation of the high priced Owsley County gas, in these words:

> "Cost of 750,000,000 cu. ft. gas purchased (Owsley Co.) @ 40 cts. per M.....$300,000"

Then the appellant's reply brief follows this quotation with a row of stars across the page, thus:

* * * * * * * * * *

Would appellant have not been fairer if it had been candid enough, in lieu of its starred elision, to print this which actually appears next in our brief below?

> "Cost bal. gas purchased 1,069,261,000 cu. ft. @ 12½ cts. per M (more on this later) .....$133,657.62"

And does not a sort of innate sense of inquiry after all the truth, lead us to consider why this second item (disclosing the balance of the cost of all the gas) was omitted from appellant's reply brief? Note the explana-

tory "more on this later" in appellant's omission. This "more" appears on pages 31-6 of our brief below (filed here by appellant) where it is explained that if the Owsley County gas be counted in, the Columbia-United Fuel intersubsidiary high priced gas is to be counted out. It is discussed as well in detail at pages 43-47 of our brief in chief here, to which the attention of the court is invited.

Eighth. And something more on this date subject. If the appellant be entitled to a decision as of a date later than that to which the court addressed itself at the appellant's invitation, then, according to appellant's assignment of error No. III, it should have a decision as of the date of the trial court's decree. Now the date of the decree is September 22, 1932. In September, 1932, the depression, "which constituted a new experience to the present generation" (*Los Angeles* opinion, 289 U. S. 287), had reached its depth. The trial court had the right to apply its own knowledge, its judicial knowledge, to an ascertainment of the then conditions. We have collated in our original brief at pages 34 to 40, inclusive, the discussion and authority upon the subject of judicial knowledge; and no man can be so blind as to be unaware of what the depression did to values, labor costs, material prices, and the like. Indeed, about the only thing unaffected by it was the price at which the appellant continued to sell its gas. If, as appellant would have it, the decree's rate be rested upon depression times, here is rather an interesting manifestation of their effect upon the cause of the appellant: by a calculation to be found in the court's opinion at page 83 of the transcript, it ap-

pears that the capital stock of the Central Kentucky Company, in the fall of 1927, was exchanged on the basis of 2¼ shares of Central for 1 of Columbia preferred, on the market value of $108.00 per share for the Columbia preferred. Now, as from our current knowledge of the times, we learn that the Columbia preferred has sold in recent times for less than $60.00, and we shall be infinitely more than fair if we allot to it a depression value of $70.00. As measured by the 2¼ for 1, we would have, at $70.00 for the Columbia, a value of $28.00 for the Central Kentucky, equaling, for the 60,000 shares, a total value of the Central Kentucky property to be $1,680,000.00. To that sum we allocate the figure of 55.1% for Lexington (Tr. p. 83); and we have a resultant depression value for the Central Kentucky property at Lexington to be $925,680.00. To this we may add (generously taking no stock of the effect of the depression) the court's ascertained value (Tr. top page 85) of the Lexington Utilities properties leased by the appellant, $611,227.00 in amount; and we have a resultant Lexington rate base depression value of $1,536,907.00, some 30% less than the court's December 31, 1926, value of $2,198,107.00 (Tr. p. 85). With the gas rate to the consumer the same, the increased rate of return on the depression value is obvious.

In making this last foregoing comparison, it is to be remembered that the trial court's opinion considers all the testimony upon value and finds it to be (Tr. pp. 83-4) substantially that represented by the $108.00 value of the Columbia stock at the time of the sale; and it is not unfair, it is thought, to use its depression value as a fair test of the actuality of rate base values during the

depression period. So, again, it is submitted that the appellant is in deeper trouble if it should get a decision as of September, 1932. Its failure to get it is a cause for an assignment of error by it, but the company stands strangely mute about that date when it comes to its argument.

It would not seem to be difficult to comprehend an argument that the court might take stock of the depression, nor to appreciate either its relevancy, or that of the authority, upon the subject.

Ninth. We endeavor now to make clear our position about, and the apposite authority upon, the rate of return.

One rule is that the rate of return may very well be measured by the current investment rate in the locality served. We cite:

City of Huntington vs. Public Service Commission, 89 W. Va. 703, s. c. 110 S. E. 192. Here Judge Ritz, then president of the Public Service Commission, now general counsel for appellant, wrote this:

> "Every one concedes that the rate of interest which the utility is required to pay for money that it borrows is in a large sense a measure of the return to which it is entitled. I cannot agree that a rate is reasonable which will produce to the stockholders, after paying all expenses, all fixed charges and taxes, a return largely in excess of what other people receive upon their money in investments no less stable and reliable."

The courts will take judicial notice of the markets, and of the statutes of the several states; so

(a) The Wall Street daily markets indicate that the parent Columbia Gas and Electric Company floated its debentures at 5%.

(b) Under Sections 2218-9 of the Kentucky Statutes, the collection of more than 6% interest is denounced as illegal.

These measures of borrowing rates and local interest rates have been frequently approved of as fair. They are accepted as such in *Bluefield Water Co. vs. Public Service Commission*, 262 U. S. 679, s. c. 67 L. Ed. 1176; *Denver vs. Denver Union Water Co.*, 246 U. S. 178, s. c. 62 L. Ed. 649; *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19, s. c. 53 L. Ed. 382; *United R. & E. Company vs. West*, 280 U. S. 234, s. c. 74 L. Ed. 390, and many other authorities, both state and federal. And it is submitted that 6% for return is fair, equalling $132,000.00, minus, upon the trial court's rate base of $2,198,107.00. Let us get the trial court's results on the rate base and expense allowances of which appellant makes no complaint; and at Tr. pages 88-9, we add the court's ascertained return of $120,909 at 40c for gas, to its like return of $144,574 at 50c for gas, and dividing by two, to get the mean of 45c gas, the rate of the Commission, we have a return of $132,776.00, something more than a 6% return on the trial court's rate base. And this calculation includes, it will be remembered, an annual amortization-extraordinary upkeep charge of $75,000.00, without support in the records.

As explaining away its unwillingness to accept what other investors take in Kentucky, appellant is too loud, we think, in its lamentations over the hazard of its business. The hazard simply does not exist. The supplies

are abundant. The plants are in 91% condition (so says appellant's expert). It delivers at Lexington through a perpetual lease of the distribution system of a corporation with a perpetual franchise there. And here is what this court wrote (in the *Willcox* case, *supra*) of the "hazard" in the business of a gas company similarly circumstanced:

> "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the City of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business."

That should not be difficult to comprehend.

Tenth. In *San Diego Land & Town Co. vs. National City*, 174 U. S. 73, s. c. 43 L. Ed. 1154, this is written:

> "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property

> under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

Is not it easy to follow that reasoning, and to discover its relevancy?

Eleventh. We bring our own reflections, and invite the minds of the court, back to the fact that the trial court allowed

(a) An annual charge of $50,000.00 to amortize the appellant's properties to "recover the entire investment" in the twenty years of the franchise, with nothing back of it but an empty hypothesis of an expert who says nothing, who knows nothing, about gas supplies.

(b) An annual charge of $10,263.00 to amortize the properties of the Lexington Utilities Company, operated by appellant at an arm's length lease, and of which it owns no part. (The leasing contract appears as pp. 267-274, inclusive, of the record, printed as an appendix.) And we submit again that the incorporation of this $60,263.00, the total of the two allowances for amortization, itself a return of near 2½% on the rate base, is without foundation in the record.

This relevancy and reasoning seem not difficult to discover.

Twelfth. If it be ruled by this court that a trial court has the right to substitute its own independent judgment for that of a due-process fixation by the Kentucky Commission, then we submit that the courts are bound in their approach by an automatic reluctance against interference. We argue as well that decisions

emanating from this Kentucky tribunal have a presumption of correctness behind them. This enunciation of view, it would seem within fair reason, is easy of understanding. And assuredly the relevancy of these authorities, in every one of which there is direct statement of the rule, must be accepted:

Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41, s. c. 53 L. Ed. 382.

Minnesota Rate Cases, 230 U. S. 352, s. c. 57 L. Ed. 1511.

Knoxville vs. Knoxville Water Co., 212 U. S. 1, s. c. 53 L. Ed. 371.

Darnell vs. Edwards, 244 U. S. 564, s. c. 61 L. Ed. 1317.

R. R. Commission vs. Cumberland T. & T. Co., 212 U. S. 414.

Illinois Central R. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441, s. c. 51 L. Ed. 1128.

Thirteenth. The reply brief (p. 37) for appellant makes the point that the franchise agreement for a *pendente lite* 60-cent rate is in some way, or to some extent, proof of an "understanding" that the rates "were to be under the 60-cent conditions." Happily in the writing of the franchise it was foreseen that, sooner or later, the Gas Company would be riding that wagon; and to forestall it, there was written into the very franchise contract itself (Tr. p. 32, Sec. C) an express declaration by the city, in so many words, that any rate in excess of 40 cents was excessive, and that nothing in the franchise should prevent the Commission or the courts from fixing,

or the city from contending for, a lower rate even than that stated.

Fourteenth. Appellant's reply brief concludes with the general and objectionable charge that our brief in chief "is replete with statements for which there is no foundation whatever in the record or in fact." It is not believed by us that appellant's counsel meant to make just that rather inexcusable statement. We remark the significant fact that they designate not one single misstatement of ours. We are not conscious of having made a single one. We do not believe that we made a single one. We leave to the court the propriety of the statement, to the record its accuracy, and to opposing counsel their reflections about it.

Very respectfully,

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BAILEY P. WOOTTON,
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Attorneys for the Appellees.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. [redacted] 11

CENTRAL KENTUCKY NATURAL GAS COMPANY, *Appellant*,

vs.

RAILROAD COMMISSION OF KENTUCKY ET AL., *Appellees*.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

MOTION, WITH BRIEF, OF MRS. GEORGE HIGNIGHT ET AL., MOVENTS, APPEARING SPECIALLY FOR THE PURPOSE, TO DISMISS THE APPEAL.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
Counsel for Movents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 779.

CENTRAL KENTUCKY NATURAL GAS COMPANY, *Appellant*,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, ET AL.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

MOTION ON SPECIAL APPEARANCE TO DISMISS THE APPEAL, WITH BRIEF.

Now comes Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Kelph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson and H. E. Stevens, who were parties of record

in the Court below individually and as members of and representatives of the Gas Consumers League of Lexington, Kentucky, a group composed of about 6200 gas consumers, citizens and taxpayers of the City of Lexington, and other groups of gas consumers, appearing specially for this purpose, and no other, move the Court to dismiss the above entitled appeal for the reasons herein set forth.

1. These movents file herewith a certificate, being a certified copy of the petition of these movents filed as intervenors in this cause in the lower Court, being the District Court of the United States of the Eastern District of Kentucky and sixty-nine additional pages of proceedings in the lower Court—which petition and proceedings are omitted from the transcript of the appeal as printed in this Court and which omitted record is necessary for proper determination of the issues involved in this appeal.

Further omitted records are now tendered, for the consideration of the Court, marked volume 1 and volume 2, being certified copies of proceedings before the Kentucky Railroad Commission in this case which are omitted from the printed transcript in this Court on this appeal, the decrees of the Court below made the entire Railroad Commission record a part of the record of the Court below; it appears from these certificates that the movents were made parties to and took an active part in all the proceedings in the lower Court, as well as before the Kentucky Railroad Commission, in dealing with the question of rates involved in this proceeding; and further that by reason of the fact that they and those for whom they have spoken in the Court below and before the State Railroad Commission were then and are now consumers of gas of the appellant company in the City of Lexington, their interests in all these proceedings are of the most vital character.

2. The Kentucky Railroad Commission refused to take jurisdiction of and try this rate proceeding that is sought to be enjoined in this suit until it was required to do so by a Writ of Mandamus sued out by these movents and those

they represent in a suit in the name of Mrs. George Highnight and other movents in the State Courts of Kentucky, wherein present Counsel for appellants appeared as Counsel for and represented the Commission; the City Attorney of Lexington, Kentucky, at the time of the mandamus suit was General Counsel for one of appellants local affiliates or subsidiaries.

3. The movents further respectfully represent that some $900,000.00 has been impounded under the orders of said Railroad Commission and said lower Court to the end that refunds may under certain conditions be made to all the consumers of gas in Lexington; and these movents and the ones they represent constitute all of such gas consumers and potential beneficiaries of said impounded funds, except Featherstone; the refund that Featherstone is entitled to will amount to about $300.00, but he never applied for or sought such refund; that movents and some 4200 consumers in the groups represented by movents have filed written petitions for their refunds, and the others have applied through movents; said impoundings and related proceedings were all made upon the application of these Movents.

4. At page 38 of the printed record appears section 37 of the franchise in controversy in this litigation which is as follows:

> "Sec. 37. In any proceeding in the Railroad Commission, Court, or other tribunal or before the City Commissioners under section 7 of this Ordinance, where the rates or regulations as provided for under the provisions hereof are being assailed or sought to be regulated by agreement under said Section 7 by the Company or the City, *any customer,* or *group of customers,* of the Company may appear and become a party thereto, and before any hearing shall be instituted for a fixation of rates before the City Commissioners as provided in Section 7, notice of any proposal to change the rates and of any hearing thereof shall be first published for a period of not less than five days in the official newspaper of the City of Lexington."

By virtue of said franchise provision the movents were authorized as a matter of right, and permitted for themselves and for those they represent to intervene and take part in all proceedings before the Kentucky State Railroad Commission and the lower Court in the hearing and determination of the issues involved in these proceedings; and in all such proceedings before said Commission and the lower Court they were represented by duly selected counsel, being J. A. Edge, Esq., of Lexington, Kentucky, for themselves and for those they represent, the thousands of gas consumers, members of the Gas Consumers League of Lexington, Kentucky, and the said J. A. Edge did in all such proceedings appear as counsel and participated in all such proceedings and was so recognized by the Court below and by the said Railroad Commission as the aforesaid omitted records affirmatively show.

5. The movents further respectfully represent that in the appeal, S. B. Featherstone is indicated in appellants' Bill as one who represented himself and all others similarly situated, but does not allege or contend he represents any group or is one of a group representing these movents or the Gas Consumers for whom the movents have acted, but he only represents himself and the City, as he is one of the four City Commissioners; that said Featherstone has never been a member of the Gas Consumers League of Lexington, Kentucky, which was organized for and on behalf of all the gas consumers of the said City; that the said Featherstone has never appeared before the Kentucky Railroad Commission or before the lower Court; nor filed any pleading or other paper or presented any testimony on behalf of himself nor has he employed any counsel to represent him in any of these proceedings and whatever representation as counsel he may have had herein, has been by counsel of the city, and this has been of a purely incidental character and as movents allege not fully representative of the rights and interests of the gas consumers of Lexington, Kentucky. Further the Gas Consumers League of Lexington have throughout the course of these proceedings believed that it was necessary

to have separate counsel and accordingly have had separate counsel in all these proceedings; and as a matter of fact caused to be written into the aforesaid franchise section 37 above quoted, so that there could be no secret dealings between the Company and the City, and to permit any one customer to intervene in his own behalf, but his own behalf only, and to permit any groups to intervene; the Kentucky Railroad Commission and the lower Court recognized Featherstone as an individual for himself, and then also recognized movents and those they represent as a group.

BRIEF.

Wherefore, the movents respectfully move this Honorable Court to dismiss this appeal for lack of proper parties thereto; and this motion is made without the intent or purpose of entering a general appearance for the movents herein but only their special appearance for the specific purposes of moving the dismissal of this appeal.

Movents state in behalf of this motion that not having been made parties to this appeal nor having ever been served with any citations they have been materially delayed in ascertaining the facts concerning the appeal, and in taking steps to protect themselves, including the filing of this motion; their first knowledge of the appeal was through newspaper publication after the appeal was docketed. They further state that they have used all diligence in the premises and they pray the equity of the Court.

This motion now filed in this form will be immediately printed and the printed copies filed on Monday, May 8, 1933.

The movents rely on Richardson vs. Greene, 130 U. S. 104 at 115, which dismissed the appeal No. 181 where the Court said:

> "But the issuing may be waived by the appellees; and a general appearance by them is a waiver of a citation. Alviso vs. United States, 72 U. S., 5 Wall. 824 (18: 492); Sage vs. Iowa Cent. R. Co., 96 U. S. 712,

715 (24: 641, 643). In No. 181 a general appearance for the appellees T. W. Ferry, Hodgden, Elwell, Nims and E. P. Ferry was entered in this Court on January 11, 1889. As to John Bower & Co. and John F. Betz *no general appearance for them* has been entered in No. 181, but only on January 14, 1889, an appearance specially for the making of the motion by them. *This is not a waiver of a citation.*"

Movents also rely on the case of Terry vs. Abraham, 93 U. S. 38, in which the Court held that where an appellant obtains an order of severance in the Court below, and does not make parties to his appeal some of the parties below who are interested in maintaining the decree, he cannot ask its reversal here on any matter which will injuriously affect their interests, and the Court said at page 39:

> "Conceding the appeal to be good as to these parties, and the issues between them (which is a little doubtful), it is very clear that no modification of the decree can be had here to the prejudice of those who were parties below and are not parties here."

See also Wilson vs. Keisel, 164 U. S. 248; 41 L. ed. 422.

Movents further respectfully represent that if the pending appeal should be determined on the record as it stands and without opportunity to prepare through counsel for argument and brief on the appeal, they will be irreparably injured in the event that such decision on the appeal as it stands may bind them in the premises.

But under Terry vs. Abraham, above, these movents cannot be bound by the judgment of this Court on this appeal unless they are parties to the appeal.

Chief Justice (then Mr. Justice) Hughes states the rules *In Re* Metropolitan Trust Company, 218 U. S. 312 at 320:

> "The decision of the circuit court of appeals, in reversing the final decree and in directing the remand to the state court, was of course, subject to the necessary limitations that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of 'the ordinary rules re-

specting appeals' that 'all the parties to the record, who appear to have any interest in the order or the ruling challenged, must be given an opportunity to be heard on such appeal'. Davis vs. Mercantile Trust Co., 152 U. S. 590, at page 593, 38 L. ed. 563, 564, 14 Sup. Ct. Rep. 693, 695. See also Terry vs. Abraham (Terry vs. Merchants & P. Bank), 93 U. S. 38, 23 L. ed. 794; Wilson vs. Keisel, 164 U. S. 248, 251, 41 L. ed. 422, 423, 17 Sup. Ct. Rep. 124. If a party has not had this opportunity he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly when decree was entered in the Court below upon the mandate of the circuit court of appeals, the trust company was expressly excepted from its operation."

There is omitted from the transcript of the record on this appeal several hundred pages of material and vital testimony which was introduced in the Railroad Commission and in the lower Court, and there can be no proper consideration or determination of the issues involved on this appeal without such evidence.

These movents file herewith as part of this motion the affidavits of (1) Joseph W. Delph, president Gas Consumers League of Lexington, Kentucky, (2) J. Foley Price, former Commissioner of the City of Lexington, (3) Z. F. Elkin, former Commissioner of the City of Lexington, (4) W. C. Wilson, also a former Commissioner of the City of Lexington; also the affidavit of John W. Hardy.

Wherefore these movents respectfully pray that the above entitled appeal be dismissed.

Respectfully submitted,

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
Attorneys for these movents appearing specially for the purpose of this motion and for no other purpose.

DISTRICT OF COLUMBIA, to-wit:

I, John W. Hardy, being first duly sworn, depose and state:

I am a citizen and resident of the City of Lexington, Kentucky and by profession a minister of the Gospel and for many years, I was principal or member of the staff of the following colleges: McLean College, Hopkinsville, Kentucky; Culver-Stockton College, Canton, Missouri; and Transylvania College, Lexington, Kentucky. For the past sixteen years, I have been a resident and taxpayer of the city of Lexington, Kentucky, and a consumer of gas therein.

I am fully acquainted with all the proceedings in the various courts and before the State Railroad Commissioner of Kentucky, referred to in the instant appeal and in the motion to dismiss the appeal, this day being filed in the Supreme Court of the United States. I have attended all the hearings in the lower courts and before said Railroad Commission, dealing with the issues involved in these proceedings. At all such times, I have been Chairman of the Executive Committee of the Gas Consumer's League of Lexington, Kentucky, and in such capacity and as representing said League and its members and myself as a gas consumer and litigant, I have attended such hearings and have given assistance to counsel for representing said League and the gas consumers of Kentucky in all said proceedings. In addition, I have presided at various mass meetings in the City of Lexington, participated in by the gas consumers of said city, which meetings were called and held for the purpose of protecting the gas consumers of said city and to deal with the questions involved in the pending suit and the proceedings before the Kentucky Railroad Commission.

S. B. Featherstone named as one appellee in the appeal has not participated in any of these meetings, nor has he ever represented or undertaken to represent in any helpful

way the interests of the gas consumers of Lexington, Kentucky in any of the proceedings; nor has he any authority, and never has had any authority, to act for the Gas Consumers League of Lexington Kentucky, nor for any of the gas consumers of Lexington except for himself; he is not a member of any group nor group of gas consumers of said city.

I have read the foregoing motion to dismiss the appeal by Mrs. George Hignight and others, and the accompanying affidavits and documents and the best of my knowledge, information, and belief the statements contained in same are true and correct.

JOHN W. HARDY.

Subscribed and sworn to before me by John W. Hardy this 6th day of May, 1933.

MAUDE P. HUDSON,
Notary Public for D. C.

AFFIDAVIT OF OMITTED PARTIES.

The affiant, Jos. W. Delph states that he is a citizen and resident of the City of Lexington, Fayette County, Kentucky, and that he has lived in said County continuously for more than fifty (50) years; that he was the President of a voluntary association of gas consumers in the City of Lexington, known as the Gas Consumers League; that the membership of said League consists of more than sixty-two hundred (6,200) meter renters and gas consumers of the City of Lexington, purchasing their gas from the defendant, the Central Kentucky Natural Gas Company. In addition to its gas consumer membership the organization enjoyed the support in its various movement in favor of the gas consuming public of from thirty-five to forty-five additional persons, who were voters in said City.

The affiant has been actively connected with the litigation and legislation involving the fixation of rates for natural

gas in Lexington, Kentucky, and that he is actively participated in initiating and conducting to a successful termination a referendum proceeding directed at two gas franchises promulgated by the City of Lexington, the Central Kentucky Natural Gas Company, and a civic organization of the City of Lexington, known as the Chamber of Commerce; that the two franchises referred to in this affidavit and the other affidavits filed herewith contained provisions, highly inimical to the best interest of the citizens and the gas consumers of the City of Lexington, and if said franchise would have become effective, would have cost the citizens of the City of Lexington, a large sum of money in excess of reasonable and just rates for gas sold; that the officials of the City of Lexington and the said Central Kentucky Natural Gas Company are in accord with the provisions of the said franchise except in minor essentials.

At the time said franchises were introduced, the Corporation Counsel of the City of Lexington was W. H. Townsend who was General Counsel and closely identified with the Lexington Utilities Company which said Company owned the distribution system in Lexington through which the Central Kentucky Natural Gas Company delivered all gas sold by it, and which Utility Company also had an agreement with the Central Kentucky Natural Gas Company, that any franchise acquired by it to sell gas, would be sold and assigned to said utility company and by said Utility Company leased back to the Central Kentucky Natural Gas Company, to keep said gas company qualified to sell gas, but there was to be retained in the retransfer of said franchise 12½ per cent of the gross receipts received by the Gas Company for the sale of gas, said percentage to constitute a rental for the said distribution system of said utility company. It became known to the citizens of Lexington that collusive negotiations were being conducted between the City of Lexington and the Gas Company and that the close association between the City of Lexington and the utility company, through the

fact that the Corporation Counsel of the City of Lexington was also general counsel for the utility company, it became necessary for the gas consumers of the City of Lexington to organize to protect themselves against the combination of the City of Lexington and the said Gas Company, to prohibit the Gas Company to charge unreasonably high rates for its gas product; that in the said contest, the said S. B. Featherstone fraudulently appeared as the exponent of the two franchises, defeated by the said referendum proceeding. Said franchise provided for a minimum gas pressure of two ounces and a maximum of eight ounces, said provision being such that the gas service of said Company would thereafter have been, as it theretofore had been in periods of inclement weather, absolutely valueless; that the said Featherstone called a public meeting and openly advocated the adoption of said franchise, containing conditions highly advantageous to the Gas Company but meaning disaster and calamity to the gas consumers; that the said Featherstone was never a member of the gas consumers league and at no time represented the gas consumers as against the wicked and illegal combination between the City of Lexington and the said Gas Company; affiant states that it is true that the said Feathersone is named as a co-plaintiff with the City of Lexington in certain feeble gestures of a hostile nature directed by the said City toward the Gas Company, but there was no sincerity at any time, in any suit or proceeding instituted in the name of the City of Lexington against the Gas Company.

This affiant is informed, and believing his information to be correct thereupon avers and alleges the fact to be that the said Featherstone was joined in the said proceedings as a co-plaintiff at the instance and request of either the Attorneys or the officers of the said Central Kentucky Natural Gas Company. The said Featherstone also disclosed a stronger leaning toward and friendship for the said Gas Company than for the organized gas consumers, and that while the said Featherstone is named as a plain-

tiff in the proceeding before the Railroad Commission, the said Featherstone had never appeared in any proceeding before either the Fayette Circuit Court or the Railroad Commission of the State of Kentucky, and while the record in each tribunal consists of several hundred pages, there is no pleading, affidavit, statement, motion or deposition signed by the said Featherstone and he at no time had any counsel, save and except that representing the City of Lexington.

Affiant states that the said Featherstone at no time was so situated as to be considered or constituted or eligible to be a proper party to be designated as a class representative of the gas consumers of the City of Lexington; that the said Featherstone was selected by the Central Kentucky Natural Gas Company as in the offensive, an unresisting and willing defendant to the suit brought in the District Court of the United States to attack the award of the Railroad Commission of the State of Kentucky; that he made no defense in said District Court and appeared in said proceeding only once and then as a visitor with some city official; that he was named as a defendant in said proceeding in bad faith and in a sham movement to have the said Featherstone falsely presented to this Court as a representative of the gas consumers of the City of Lexington, hoping that this Court would accept the said Featherstone as the representative of the citizens of the City of Lexington in lieu and in place and stead of more than four thousand of said citizens who actively, through the Gas Consumers League of which this affiant was President, in defense of their rights as gas consumers, were engaged in this movement.

Affiant made this affidavit to disclose to this Honorable Court the fact that the gas consumers were represented in the lower tribunal by the Gas Consumers League and more than four thousand of them appearing through Counsel and selected by them and the said Featherstone, was at no time recognized by the City of Lexington as being identi-

fied with the gas consumers organization defending against a combination of the said City of Lexington and the said Gas Company to procure for, or permit the said Gas Company to adopt excessive or extortionate rates in Lexington, and prevent this Court from being misled and by being misled perchance render a decision or make same order agreeable to the parties who in good faith successfully litigated in the Fayette Circuit Court, in the Railroad Commission and in the Honorable District Court of the United States for the eastern District of Kentucky.

Further affiant sayeth not.

(Signed) J. W. DELPH.

Sworn to before me and subscribed in my presence this the 4th day of May, 1933.

(Signed) M. M. SCHEIDELL,
Notary Public, In and for
Fayette County, Kentucky.

AFFIDAVIT OF OMITTED PARTIES.

The affiant, J. Foley Price, states that he is a citizen and resident of Lexington, Kentucky, and that he has been such resident all of his life.

He states that he was appointed City Clerk of the City of Lexington, Fayette County, Kentucky, on or about the first day of February, 1925, and served continuously as such City Clerk from the date of his appointment until on or about the first Monday in January, 1928; that after being duly elected, he qualified and entered upon the discharge of his duties as one of the four (4) City Commissioners of the City of Lexington, being Commissioner of Finance, and that he occupied such position for the term ending the first Monday in January, 1920; that he was re-elected to said office by the voters of the City of Lexington, and entered upon the discharge of his duties for the second term, which expired on or about the first Monday of January, 1932.

He states that the franchise for the sale of natural gas in Lexington, expired in October, 1925, and that negotiations were opened between the Gas Company and the City of Lexington for a renewal of said franchise or for the sale of a new franchise for the sale of natural gas. The Gas Company threatened to discontinue gas service in October, 1925, and thereupon the City of Lexington filed its suit in the Fayette Circuit Court and included as Plaintiff therein, one S. B. Featherstone of the City of Lexington, as a Plaintiff purporting to sue for himself and all other citizens of the City of Lexington.

A controversy arose between the Board of Commissioners and the Gas Company relative to the franchise to be prepared and adopted. The gas consumers of the City of Lexington organized the Gas Consumers League and opposed both the City of Lexington and the Gas Company in all of the franchises, plans and legislation suggested either by the City or the Gas Company. This Gas Consumers League had for its Managers and Executive Committee, J. W. Hardy, Joseph Delph, Mrs. George Hignight, Stanley Dearborn, William Dearborn, Mrs. Gladys Berkley, P. P. O'Neill, Asa Kitchen and Mrs. Kate Bronaugh, and enlisted a membership of some ten thousand (10,000) voters.

This organization was represented through all subsequent negotiations, legislation and litigation by J. A. Edge of the Lexington Bar, who from time to time was aided in different branches of the case, by various other counsel.

A franchise ordinance was adopted, and the aforesaid Gas Consumers League inaugurated a referendum under the City Charter, signed by some thirteen thousand (13,000) voters out of a possible fifteen thousand (15,000) voters in the City of Lexington, and the franchise was repealed by the Commissioners.

The second franchise was adopted by the Board of Commissioners, which was again subjected to a referendum.

Before the referendum was completed, a compromise was affected between the City and the Gas Company on one side, and the Gas Consumers League on the other side, and pursuant to this compromise, there was placed in the franchise, Section 37, providing for the gas consumers generally to appear before the Board of Commissioners, in the Railroad Commission of the State of Kentucky, or in any Court, and become parties to any cause or contest, and be heard on terms of equality with the municipality or the Gas Company. They further required the discussion to be opened to the public and not to convene except after ten (10) days notice published in the official newspaper; that after the adoption of the franchise, a proceeding was instituted in the Railroad Commission of the State of Kentucky to fix the rates.

One S. B. Featherstone was named by the Attorneys for the City in their petition, but he was never allied with any of the activities of the gas litigation, so far as the City was concerned. He never appeared with any of the deputations of the Gas Consumers League and affiant knows of no activity on the part of the said S. B. Featherstone to indicate him as a proper party to represent the gas consumers of the City in this litigation. Affiant states that the interests of the gas consumers of the City of Lexington were represented exclusively, aggressively and continuously with the Gas Consumers League from the initiation of this action in 1925 down to the current date.

Further affiant sayeth not.

(Signed) J. FOLEY PRICE,

Sworn to before me and subscribed in my presence this the 3rd day of May, 1933.

(Signed) M. M. SCHEIDELL,
Notary Public, In and for
Fayette County, Kentucky.

AFFIDAVIT OF OMITTED PARTIES.

The affiant, Z. F. Elkin, states that he is a citizen of Lexington, Kentucky, and that he has been a resident thereof, all of his life. He states that he is now engaged in the merchandising business in the City of Lexington.

He further states that in 1926 he was elected a member of the Board of Commissioners of said City of Lexington and served on such Board until 1930.

He states he has read the affidavits of J. Foley Price and Wm. C. Wilson, with whom he served as such Commissioner, and endorses and concurs in the statements made by them relative to the gas controversy and the position of S. B. Featherstone therein.

He further states that while serving as such Commissioner, Mr. Featherstone was never called into any conference or had any connection at all with the gas controversy. He states that all expenditures were made by the Consumers League, and while he has no way of estimating the amounts expended in this manner and for this purpose by the said Gas Consumers League, he does know that the said League raised a considerable amount of money, and were recognized by the said Government as an integral part in all of the gas litigation.

(Signed) Z. F. Elkin.

Sworn to before me and subscribed in my presence this the 3rd day of May, 1933.

(Signed) M. M. Scheidell,
Notary Public, In and for
Fayette County, Kentucky.

AFFIDAVIT OF OMITTED PARTIES.

The affiant, Wm. C. Wilson, states that he is a citizen and resident of the City of Lexington, and has been such resident for the past twenty-five years excepting a period of

thirty (30) months when serving as an officer in the United States Army. He states that he is a graduate of the University of Kentucky, and that in 1923 the Board of Commissioners of the City of Lexington, appointed the affiant one of the City Commissioners to fill the unexpired term of a deceased member. He states that he served continuously on that Board from the time of his appointment until on or about the 4th day of January, 1932, at which time his term of office expired.

He states that the franchise for the sale of natural gas in Lexington expired in October of 1925, and that a Gas Consumers League was formed from among the gas consumers of the City of Lexington, of several thousand consumers and taxpayers who were opposed to the legislation proposed by the City and the Gas Company effecting the renewal of the franchise.

The League defeated one franchise by a referendum, and the second franchise had been subjected to a referendum when an agreement was reached by the City of Lexington and the Gas Company. The Gas Consumers League was represented by J. A. Edge as Counsel, and this agreement contained a provision that in all negotiations to be thereafter had relative to the fixation of gas rates, and all litigation affecting gas rates, that the consumers should be parties thereto. This provision was represented by Section 37 of the present Gas Franchise. An extensive litigation followed this both the Railroad Commission and the Federal Court. The above parties conducted this litigation on behalf of the gas consumers exclusively.

Affiant states he knows S. B. Featherstone personally; that he is a prominent citizen of the City of Lexington, but that he was never at any time identified with the Gas Consumers League of the City of Lexington. Said Featherstone was active in the affairs of the Chamber of Commerce which was apparently opposed to the gas consumers participating in the negotiations between the City and the Gas Company, and in this position Featherstone played a

rather prominent part. It was apparent from the proceeding in mass meeting that the gas consumers did not consider Featherstone at any time, either a member of the organization, or as being in sympathy with it.

Affiant states that he is familiar with civic affairs in the City of Lexington, and particularly with the litigation involved in this case, and is firmly of the opinion that said Featherstone is not a representative in any respect of the gas consumers of the City of Lexington.

(Signed) WM. C. WILSON.

Sworn to before me and subscribed in my presence this the 3rd day of May, 1933.

(Signed) M. M. SCHEIDELL,
Notary Public, In and For
Fayette County, Kentucky.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 779.

CENTRAL KENTUCKY NATURAL GAS COMPANY, *Appellant*,

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION, ET AL, *Appellees*.

To Counsel for the Appellants and Appellees:

Take notice that we will this day file the original of the attached Motion to Dismiss with Brief, the pending appeal in the Supreme Court of the United States, on behalf of Hignight et als, Movents.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
(409-10 Peoples Life Ins. Bldg.)
Attorneys for the Movents specially appearing for the purpose of this Motion and for no other purpose.

A copy was delivered to

1. Henry T. Duncan, attorney for Appellants.
2. C. M. Harbison, attorney for Appellees, in Washington, D. C., this 6th day of May, 1933, at their hotels.

JOHN H. CONNAUGHTON.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1939

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY, *Appellant*,

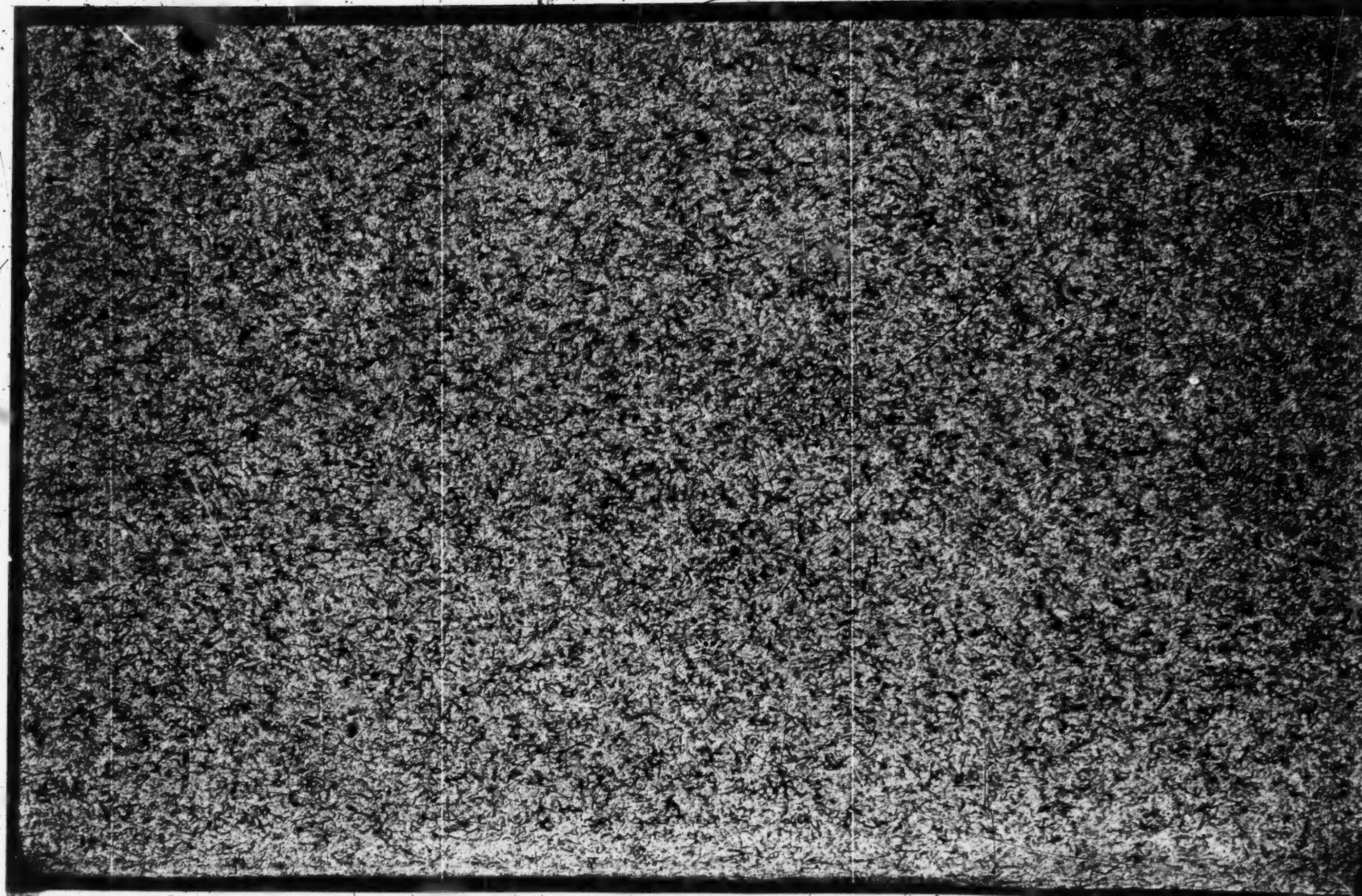
vs.

RAILROAD COMMISSION OF KENTUCKY ET AL., *Appellees*.

MOTION OF MOVANTS ET AL. TO QUASH CITATION AND DISMISS APPEAL, WITH ALTERNATIVE AND BRIEF

An Appeal from the District Court of the United States for the Eastern District of Kentucky

MARVIN H. TATTERSON,
JOSEPH A. ENDE,
JOHN H. COMBERTSON,
RAYMOND M. BRENNER,
Attorneys for Movants.



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY,
Appellant,

v.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, AND JAMES HATCHER, MEMBERS CONSTITUTING SAID RAILROAD COMMISSION ET AL.,
Appellees.

MOTION OF APPELLEES, MRS. GEORGE HIGNIGHT, MRS. WELLINGTON PAYNE, MRS. ANNA MAE HOLLINGER, MRS. GLADYS BERKLEY, J. W. DELPH, STANLEY DEARBORN, WILLIAM DEARBORN, P. P. O'NEILL, MRS. MARGARET TAYLOR, R. T. CHILDERS, NANCY BELL HENDERSON, AND H. E. STEVENS, APPEARING SPECIALLY, TO DISMISS THE PRETENDED APPEAL AS TO THEM, AND QUASH THE CITATION ISSUED AGAINST THEM, WITH AFFIDAVITS AND BRIEF

Come now the above named appellees, appearing specially for the purpose of this Motion and this Motion only, and move this Honorable Court to quash the pretended citation issued out of the United States District Court for the Eastern District of Kentucky, on the 19th day of May, 1933,

and to dismiss the pretended appeal as against these moving appellees for the following reasons, to wit:

1. No Notice of Appeal has been given to these said appellees, nor has any order allowing an appeal as to them been made and entered in this cause.
2. There has been no amendment made to the appellate proceedings in this Court.
3. These appellees were not inadvertently omitted from the original appellate proceedings taken in this case, but their omission was deliberate, and upon the theory that a judgment against defendant, Featherstone, would have bound these appellees.
4. That the omission of these appellees was deliberate and intentional.
5. That the limitation within which an appeal can be perfected from the judgment of the United States District Court for the Eastern District of Kentucky so entered in this cause has expired long before the issuance of the citation in this case or the pretended amendment of appeal.
6. That this case does not present a situation where the appellant is allowed to amend his appeal.

Wherefore, said appellees pray that the citation so issued as aforesaid be quashed, vacated, and set aside; and that the pretended appeal be dismissed as to them for the reasons herein set out.

Affidavits and other evidence will be submitted with this Motion in support thereof.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,

Attorneys for Appellees.

To Counsel for the Appellants and Appellees:

Take notice that the following named parties, Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson, and H. E. Stevens, appearing specially, to dismiss the pretended appeal as to them, and quash the citation issued against them, will, on the ..... day of September, 1933, file in the above entitled cause in court their Motion to quash the citation and dismiss the pretended appeal, a copy of which Motion is attached hereto and that said Motion will be presented and called to the attention of the Court on Monday, October 2, 1933.

Affidavits and other evidence will be used in support of this Motion.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
(409-10 Peoples Life Ins. Bldg.)

Attorneys for the Appellees.

Statement of the Case

This cause was set for oral argument on the 9th of May, 1933, but these movants brought to the attention of this Court by motion to dismiss this appeal, with affidavits, the facts that they were parties to the ligitation in the District Court, has not been made parties to this appeal and were necessary parties to it.

They submitted for the Court's inspection and examination, exemplified copy of the Petition of Mrs. Hignight and the other movants and some four hundred other persons presented to the Franklin Circuit Court, seeking a mandamus against the Kentucky Railroad Commission to compel

it, to assume jurisdiction for the various gas controversies, including all of the litigants, and the Central Kentucky Natural Gas Company, appellant here, and the judgment of that Court granting the writ.

They presented to this Court the certified record of the pleadings, orders, hearings, testimony and award made to them by the Kentucky Railroad Commission, disclosing to this Court that as to these movants and some forty two hundred other persons, no injunctive relief had been prosecuted against them by appellant. They also presented to the Court for it inspection certified copies of numerous proceedings had in the District Court of the United States by, and affecting, these movants, which are not in the printed record in this Court. They present with their affidavits at this time data on extensive litigation projected by them in the State and District Court, seeking to effectuate the award of the Railroad Commission, as it was sustained by the District Court, which litigation has been submitted and parties are awaiting decisions.

On an inspection of these records, this Court on May 9, 1933, declared these movants to have been parties in the lower Court and necessary parties to this appeal. The argument on the merits was continued to October 9, 1933, to give the appellant an opportunity to adopt appropriate procedure if any is available to remedy this lack of parties.

Appellants, on May 17, 1933, sued out of the District Court, and served an alias citation (R. 275), but it did not petition for an appeal against these movants; it did not file any designation of record, it did not bring up or print the omitted and necessary portions of the record mentioned above.

The affidavits filed in support of the movants' present motion to quash the citation, show that the City of Lexington, Kentucky, is governed by the Commissioned form of Government.

This form of Government includes the initiative by which the citizenry may initiate desired legislation and the right of referendum under which obnoxious legislation may be vetoed by the popular will. Appellants failed to comply with Rules 10 and 13 of this Court.

This affidavit shows that Section 37 (R. 38) was placed in the present franchise to give to the citizenry a representation in gas rate controversies, separate and apart from, and independent of the city officials.

The desire of the citizens to represent themselves in their own right, has been justified by subsequent events. The failure of the City of Lexington heretofore to move this Court to dismiss appellant's appeal alone tends to justify the distrust in which they held their officials in connection with the Gas rate litigation.

The franchise (R. 31), as a result of the activities of these movants, is a tripartite instrument. The parties are:

1. The consumers, real parties in interest.
2. The Gas Company, a real party in interest.
3. The City of Lexington, a merely nominal party, by reason of having enacted the franchise.

The Railroad Commission award was made on the 9th day of October, 1928 (R. 12). It was suspended thirty days for further procedure in that tribunal. No appeal was attempted against movants. No injunctive relief was sought against movants.

BRIEF

Point I. Appeals Which Are Defective Because of Lack of Necessary Parties Can Be Remedied Only by Timely Amendment in This Court and Then Only When the Necessary Data Appears in the Record in This Court.

By the memorandum opinion of May 9, 1933, this Court, after declaring that the applicants were parties in the Court below and necessary parties here, passed the argument

of the case on the merits to give to the appellants upon
tunity to take such action as proper procedure might indi-
cate advisable with regard to the omission of these movants
as appellees. The order of this Court did not make these
movants appellees, or indicate that they could now properly
be made so. As to procedure, the appellant was left to
pursue its own course, if any there was open to it, under
the provisions of the Federal Statute and the rules and
decisions of this Court. The Gas Company was pleased to
term this order a Mandate to somebody, somewhere, some-
how, to make the consumers parties. The consumers or
movants are satisfied sufficiently not to appeal the decree
of the District Court. They are satisfied with the award
of the Railroad Commission. They had nothing to appeal
from. No reason exists for them to cause themselves to
be impleaded in this Court; they are only seeking to dis-
miss an invalid appeal, and to obstruct and prevent a too
late, untimely and irregular effort to validate the appeal
in the two lower tribunals, they litigated as independent
parties, representing independent rights within themselves.
They believe the time for an appeal has passed. There
seems to be no rule of equity, appellate procedure, or statu-
tory provision, under which the benefits of the decree of
the lower court or the award of the Railroad Commission
can now be taken from them.

As to those of the Intervenors in the Railroad Commis-
sion, who intervened and became parties in the District
Court, no appeal was prosecuted by the appellant, no order
of appeal asked for them, no appeal bond executed, and the
notice of appeal likewise, ran only to the appellant gas com-
pany. No application was ever made to this Court for
leave to implead them. This Court does not amend writs
on its own motion, but only when timely application is made
for leave to amend.

In Sidney W. Sea v. Connecticut Mutual Life Insurance
Company, 184 U. S. 690, 22 L. Ed. 772, the court had before

it, a defective record, but one subject to amendment under Section 1006, Rev. Stat., now 873 U. S. C. A. This Court said:

> "The defect is one that is amendable under section 1006 R. S. but as no application is made by the plaintiff in error for leave to amend, and no citation has ever been served, and we are not inclined, on our motion, to make any order in that behalf."

Without asking this Court for leave to amend this record, appellant appeared in the District Court on the 17th day of May, 1933, practically eight months after the decree appealed from had been entered, and procured a citation against these movants. Upon the hearing of the application for this citation, Judge Hickenlooper indicated to the appellant, that the District Court was without jurisdiction because the *supersedeas* and appeal had removed the record from that Court to this Court. He indicated the view that the Supreme Court of the United States alone could authorize the issue of a citation in the case; however, the appellant procured the citation from the District Court and that citation is the sole step which it has taken to amend this record, or to implead the movants. The Counsel believe and submit to this Court that Judge Hickenlooper's suggestion is the law of this case; that the District Court was without jurisdiction to issue the citation in the case. It would appear from a reading of the case that only this Court has power to amend the record once it is removed into it. Having failed in its plan to eliminate further contest with the movants by selecting as their champion a David of their own creation, and having failed in the attempted imposition it seeks to remedy its plight by bringing itself within the purview of Section 873, Title 28, U. S. C. A., formerly 1005 Rev. St. The jurisdiction of this Court in the premises is prescribed and limited by that section which

provides for amendment or correction of the record in five circumstances only:

1. Where there is a mistake in the teste of the writ.
2. Or a seal to the writ wanting.
3. When the writ is made returnable on a day other than the commencement of the next then ensuing term.
4. Or when the statement of the title of the action or parties thereto in the writ is defective, and finally if the defect can be remedied by reference to the accompanying record.
5. Provided the defect has not prejudiced and the amendment will not harm the defendant.

This proceeding would project on the theory that the award of the Railroad Commission and the decree of the District Court became final upon the expiration of the statutory time for an appeal to this Court. The appellant does not bring its case within Section 873. It adopts a novel expedient. It procures a mere citation as a substitute for a perfected appeal. It substitutes this citation for the petition for appeal, for its assignment of error, for its order of appeal, and for its appeal bond. Section 873, U. S. C. A., was not enacted to be used to create jurisdiction. It was enacted to aid jurisdiction only. It is well said by the Cyc. of Federal Procedure, Section 289, that a citation cannot be issued to create jurisdiction by bringing in omitted parties essential to the appeal. See Kidder v. Fidelity Insurance Co., etc., 105 Fed. 821, and Hudson v. Limestone Natural Gas Company, 144 Fed. 952.

Section 873, *supra*, does not seem to give this Court the jurisdiction to amend the record by bringing into it, or making appellees of, movants, because the record accompanying the appellants' appeal does not show that the movants named in the citation were in anywise connected with the litigation in the Court below. Appellants prepared these records, and deliberately as part of their plan of

procedure eliminated all the proceedings filed by the movants in the lower Court and the Railroad Commission and all reference to them in or on the orders taken in that Court and Commission.

The appellee, City of Lexington, whether purposely or coincidentally, likewise, carefully abstained from making use of, or bringing up, any part of the record that we have disclosed to this Court, and participation of these movants in the Court below. The appellee might well have included in its record the intervening petition of the movants, their motion to dismiss or set aside the order overruling their motion, and various other steps involving their participation on such a record; and might have moved effectively to dismiss appellants' appeal and protected all rights of the citizenry of Lexington under the award of the Railroad Commission and the decree of the District Court refusing to enjoin that award.

In each case cited in this section of the Brief it will be observed that the defect was remedied by an inspection of the accompanying record.

In Knickerbocker Life Insurance Company v. P. H. Pendleton *et al.*, 115 U. S. 339 340, 29 L. Ed. 432, a motion was made to amend the appeal. The citation was directed against only one of the plaintiffs, P. H. Pendlton. Preliminary appeal bond was made to him alone, but the bond for the *supersedeas*, subsequently executed, was made to all the plaintiffs by name. Discussing that case, the Court said:

> "The writ of error in this case was brought to reverse this judgment, and a judgment of reversal was pronounced on the 5th of January last. It was subsequently discovered by the Court (a fact not noticed by any of the Counsel) that the writ of error was sued out and the citation was directed and served against only one of the plaintiffs below, to wit, P. H. Pendleton. The preliminary appeal bond for costs was also made to P. H. Pendleton alone; but the bond for super-

> sedeas, subsequently executed, was made to all the plaintiffs, and the subsequent proceedings were generally entitled in the name of P. H. Pendleton et al. This Court, in view of the defect in the writ of error, entered a rule on the plaintiff in error, to show cause why the judgment previously entered should not be vacated and the writ of error dismissed."

The rule was discharged.

In Carlisle Mason *et al.* v. United States, 236 U. S. 381 386, 34 L. Ed. 545, argued by Judge Taft, while Solicitor General of the United States, judgment was rendered in favor of the United States against a postmaster and five sureties. Two of the sureties appealed. All parties to the record in the lower Court were not parties to the appeal Appellant asked leave to amend the writ of error, the citation and the appeal bond. This motion was joined by *all the omitted parties entering their appearance and consenting to the amendment.* They further moved as an alternative remedy for their plight, that this Court permit a judgment of severance and that the omitted parties be made defendants. The time for appeal as to the omitted parties had passed. The points stressed by Judge Taft in his brief was sustained and the court order was:

> "Motion for leave to amend the writ of error, citation and bond, denied. Writ of error dismissed."

There was lack of jurisdiction, as there is in the case at bar.

In Rininger v. Puget Sound Electric R. R. Co. *et al.*, 220 Fed. 419 (9 C. C. A.). Suit by Rininger against the Electric Company and Traction Company for death of father. At trial directed verdict was given the Traction Company. Trial resulted in verdict for Light Company. Rininger appealed only against the Light Company. The Traction Company was not named in the writ of error, or in any way made a party to the proceeding. A motion was made to dis-

miss because of this defect of parties. Appellant met this motion by asking leave of the appellate court for permission to amend the writ of error and the citation, and to substitute for the original appeal bond a new and amended bond to conform to the amended writ of error on the ground that it was inadvertently omitted. The motion to amend was granted. The error could only be corrected from the accompanying record.

The leading case on the subject of amendment is probably Estis v. Trabue *et al.*, 128 U. S. 225-230; 32 L. Ed. 437. The Court held as reported in the 1st, and 4th *syllabi*:

> "1. This Court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the expression '& Co.' or the expression 'and others' or in any other way than by their individual names.
>
> 2. But where the record discloses the names of the individuals who compose the firm, the writ of error can be amended by this Court, under section 1005 of the Rev. Statutes, Sec. 3, Act of June 1, 1872 (chap. 255, 17 Stat. at L. 196); provided the defect has not prejudiced and the amendment will not injure the defendant in error.
>
> 4. Where there is a substantial defect in the writ of error, which this Court cannot amend, it has no jurisdiction to try the case. It will then, of its own motion, dismiss the case without awaiting the action of a party."

The amendment was allowed as the individual name appeared affirmatively in the record in this Court.

In Thomas *et al.* v. Green County, a Kentucky case (6 C. C. A.), 146 Fed. 969, opinion by Judge Lurton, the record was defective. A motion to dismiss was made because of this defect. The Plaintiffs in error met the motion to dismiss the appeal not from a mere citation from a court deprived of jurisdiction by appeal, but by timely application to the Appellate Court for leave to amend the writ and citation by inserting in each the names of the omitted

parties below, and by motion to amend the appeal bond or to give another bond. The defect of parties was the result of mistake. An examination of the accompanying record showed the names of the parties and the amendment was permitted. In discussing the case, Judge Carlton said:

"The right to amend the writ of error and citation by adding omitted plaintiffs, depends primarily upon whether the record shows enough to authorize the amendment under Section 1005, Rev. Stat. (U. S. Comp. Stat. 1901, p. 711), Batts v. Prahm, 120 U. S. 220, 9 Sup. Ct. 50, 32 L. Ed. 637; Walton v. Marietta Chair Co., 157 U. S. 342, 15 Sup. Ct. 630, 39 L. Ed. 725. Thus, in Batts v. Prahm, the plaintiffs in error, as well as the defendants in error, were described only by the names of firms. The record disclosed the names composing the firms, and an amendment inserting their names was allowed. In Walton v. Marietta Chair Company, the plaintiff in error was described as administrator of a certain estate. The accompanying record showed that another person named therein, claimed to have succeeded the person named as administrator, and that this other had tendered the bill of exceptions and given bond to prosecute the writ of error. The substitution was allowed. In Knickerbocker Life Insurance Company v. Pendleton et al., 115 U. S. 339, 6 Sup. Ct. 71, 29 L. Ed. 410, the Supreme Court, after final judgment discovered that the writ of error was sued out and citation directed and served against P. H. Pendleton, only one of the plaintiffs below; that the appeal bond was made to him alone, but that supersedeas bond ran to all of the plaintiffs below, and that all subsequent proceedings were entitled in the name of P. H. Pendleton et al. After notice to Plaintiff to show cause, the Court allowed the writ of error to be amended, set aside the judgment, ordered a new citation to all the plaintiffs below, and when same was served, allowed a re-argument.

The test of the right to amend when some of the plaintiffs are not joined in a writ of error seems from the case cited to turn upon whether the omission to join them appears from the record to have been accidental."

In Credit Company v. The Arkansas Central Railway Company *et al.*, 128 U. S. 258 261, 32 L. Ed. 448, the final judgment was entered January 22, 1883. An appeal was prayed and allowed. No bond was given and no citation issued and no return of the record was made to the ensuing term of the court. The appeal lapsed on January 22, 1885. Two years after the entry of the decree, a petition for an appeal was presented by the Solicitor of the Complainant to Mr. Justice Miller of this Court and the appeal was allowed by him. At the same time, the Justice signed the citation to the Defendants to appear in the Supreme Court. A bond for costs was likewise approved by the Justice. These papers were not presented to the Circuit Clerk, nor filed with the Clerk thereof until the 27th day of January, 1885, five days after the term of office expired. In discussing that case, Mr. Justice Bradley said:

> "The attempt made in this case to anticipate the actual time of presenting and filing the appeal, by entering an order nunc pro tunc, does not help the case. When the time for taking an appeal has expired it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

The cases hold that this Court fails to obtain jurisdiction if the record fails to give data on which to amend.

It will be noted in the case at bar that no effort was made to procure a citation even from the District Court, until seven months and twenty seven days had elapsed.

In Mary Ellen Hardee *et al.* v. Benjamin J. Wilson, 146 U. S. 179 183, 143 L. Ed. 933, the decree of the lower court declared a deed affecting appellant Hardee and Minor and his wife to be void. From the decree, Hardee alone appealed. The court enunciated the doctrine of joinder of all of the parties in the following language:

"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. Owings v. Kincannon, 32 U. S. 7 Pet. 399 (8:727), Mussina v. Cavazos, 73 U. S. 6 Wall 355 (18:810).

This court reviewed the authorities and dismissed the appeal because Minor and his wife jointly interested with appellant, had not appealed and summons and severance had not been made.

In Sipperley *et al.* v. Smith *et al.*, 155 U. S. 86, 39 L. Ed. 79, the intervenor prosecuted an appeal from judgment of the lower court without joining the other parties to the suit in the appeal and without an order, permitting a severance. The title of the cause in the District Court as it appeared in the record was John O. Smith *et al.* v. A. F. Sipperley *et al.*, and M. J. Gray, Mrs. A. F. Sipperley, Mrs. E. J. Walling and H. S. Lee and the Union Bank, intervenors. The title to the judgment in the lower court followed the title in the caption to the proceeding. The record disclosed a bond dated December 22, 1893, entitled John O. Smith *et al.*, Respondents, v. A. F. Sipperley *et al.*, Defendants, and M. G. Gray *et al.*, Appellants, signed by Mrs. A. F. Sipperley, Mrs. A. J. Wallings, H. S. Lee, and the Union Bank, as principals, running to John O. Smith, George Whiting, Chas. P. Connor and G. S. Smith, composing the firm of Smith, Whiting, Connor and Company. The defendant, M. J. Gray, was omitted from this bond and from the appeal. The bond was approved by the Chief Justice of Utah. Citation was issued, dated January 4, 1894, directed to the defendants and their attorneys. The appellee moved to dismiss the appeal for want of parties or to affirm it. No application was made to the Supreme Court either for a severance or an amendment. The Supreme Court, commenting on this, said:

"No application for summons and severance as to M. J. Gray or any equivalent therefor appeared in the

> record, nor any order permitting severance; *nor was any application made in this court for the issue of citation* to A. F. Sipperley and H. S. Lee, *or leave to perfect the appeal as to them;* nor did they or Gray appear herein. Appellees moved to dismiss or affirm."

The appeal was dismissed.

This case holds that leave to amend a record pending in this Court must be made to this Court. In the case at bar, the citation was issued and the bond was not amended by the lower court, after it had lost control of the case by the appeal.

In P. P. Mast & Company v. Superior Drill Company, 154 Fed. 45 (6 C. C. A.), before Judges Lurton, Severens, and Richards, an amended assignment of errors was filed with the Clerk of Court some five days after the appeal had been taken. The court said:

> "The assignment of errors is to be filed in the court below before the court loses jurisdiction, and is a necessary condition to the allowance of the appeal and the transfer of the jurisdiction to the Court of Appeals."

Counsel find no case where an appealed record has been amended without an order or allowance for the amendment by the appellate court.

United States v. Hooe *et al.*, 1 Cranch, C. C. 116, 26 Fed. 369, held:

> "After a writ of error has been served and returned to the Supreme Court, the record is no longer before the court below and cannot be amended, although at an adjourned session of the same term, it appears that the writ of error has been dismissed in the court above at the request of the party praying an amendment."

(Affirmed in 3 Cranch (7 U. S.) 73.)

In the case of Sipperley *et al.* v. Smith *et al.*, 155 U. S.

84-87, *supra*, the appeal was dismissed because all parties to the record were not included in the appeal. The Chief Justice in passing on the motion, said:

> "The motion to dismiss is sustained upon the authority of Masterson v. Howard, 77 U. S. 10 Wall., 416 (19:953); Hardee v. Wilson, 146 U. S. 179 (36:933); Inglehart v. Stansbury, 151 U. S. 68 (38:76); Davis v. Mercantile Trust Co., 152 U. S. 590 (38:563). Appeal dismissed."

In Chas. D. Newton v. Consolidated Gas Company of New York, 265 U. S. 78, 80, 81, 68 L. Ed. 909, the court dismissed the appeal for want of jurisdiction because the utility company was not impleaded in the appeal. In making this order of dismissal, this Court said:

> "From the final decree of the district court fixing the costs, an appeal was taken to this court. To that appeal the Public Service Commission of New York, was defendant in the suit and was not made a party and no summons and severance was issued against it. Accordingly the appeal was dismissed in the following per curiam:
>
> Dismissed for want of jurisdiction upon authority of Masterson v. Herndon (Masterson v. Howard), 10 Wall 416, 19 L. Ed. 953; Hardee v. Wilson, 146 U. S. 179, 180, 36 L. Ed. 933; 13 Sup. Court Reports 39; Sipperley v. Smith, 13 Sup. Court Reports 39; Sipperley v. Smith, 155 U. S. 86, 89, 39 L. Ed. 79, 80, 15 Sup. Ct. Reports 15; Moytin v. Vela, 216 U. S. 598, 601, 54 L. Ed. 632, 634, 30 Sup. Ct. Rep. 439."

Upon the petition for rehearing, the appellants brought to the knowledge of the court information that the utility commission had been dissolved, and thereupon the order of dismissal was set aside.

In Branch T. Masterson, Assignee of John H. Herndon v. Volney E. Howard *et al.*, 77 U. S. (10 Wall) 416-418; 19 L. Ed. 953, a decree was entered in favor of Howard v.

Maverick and Herndon. Herndon prosecuted the appeal and stated therein that his co-defendant, Maverick, refused to prosecute the appeal with him. It was a joint decree against the two defendants. In discussing the case, the Supreme Court said:

> "It is objected by the appellee, that there is no valid appeal in this case, because the decree being a joint decree against Herndon and Maverick, Herndon alone has asked for an appeal.
>
> A careful examination of the record satisfies us that the decree is a joint decree, and the appeal is clearly taken by Herndon alone.
>
> It is the established doctrine of this Court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered, must join in the appeal, or they will be dismissed. There are two reasons for this; 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. Williams v. Bk. of U. S., 11 Wheat. 414; Owings v. Kincannon, 7 Pet. 399; Wilson v. Insurance Co., 12 Pet. 140. * * *
>
> We dismiss this appeal with the less regret as there is still time to obtain another on proceedings not liable to the objection taken to this. It is ordered accordingly, that this appeal be dismissed."

Lamon *et al.* v. Speer Hardware Co., 190 Fed. 734 (8. C. C. A.), was an action at law by the Speer Hardware Company against W. A. Lamon and J. W. Wallace, partners, as W. A. Lamon & Company. A judgment was given in favor of the Hardware Company. The Defendant appealed. The surety was not joined in the appeal. A motion to dismiss the appeal was granted because of the failure of the appellants to have the sureties joined with them or to pro-

cause a severance. The Court said it must be granted because of the decisions of this Court in Ellis v. Trahue, *supra*, and other cases.

In Ireton *et al.* v. Pennsylvania Co., 185 Fed. 84 (6 C. C. A.), the writ of error was sued out by the Plaintiff and one Defendant to review a judgment for the principal defendant. No summons and severance was had for the other defendants. The Court held that the writ of error could not be sustained in the absence of the other party.

Point II. Courts Are Without Power or Jurisdiction to Extend or Enlarge Time Limits Fixed by Statute to Perfect Appeals.

In Camden Iron Works Co. *et al.* v. Slater, District Judge, 223 Fed. 611 (6 C. C. A.), it appeared in the proceeding that the appellate procedure had been protracted, awaiting a settlement of a bill of exceptions. The Court had extended the time for the bill of exceptions, until the time for an appeal had passed. When the matter of settling the bill of exceptions came before the District Judge he refused to sign same on the ground that time for the appeal had passed. In discussing that situation, the Court said:

> "It is urged that no writ of error has been taken out, that the time therefor has expired, and that for these reasons bill of exception should not be settled. If the premises are correct the conclusion follows for in such case a bill of exceptions would be futile. No writ of error has ever issued, nor has order therefor been made; and courts have no power to extend the statutory period for taking out the writ. Nor did the pendency of settlement of bill of exceptions have that effect, for there was no legal reason why issue of writ should not precede settlement of bill. Hunnicutt v. Peyton, 102 U. S. 333, 354, 355, 26 L. Ed. 113; Shreve v. Cheesman (8 C. C. A.), 69 Fed. 785, 787 (36 C. C. A. 413)."

In Camden Iron Works v. City of Cincinnati (6 C. C. A.), 241 Fed. 846, from the *syllabi*, we quote:

"Under Act March 3, 1891, c. 517, sec. 11, 26 Stat. 829 (Comp. St. 1916, sec. 1647), requiring a writ of error to be sued out within six months, the six months limitation is jurisdictional and the courts have no power to extend it."

In American Baptist Home Mission Society v. Barnett *et al.*, 26 Fed. (2d) 350, Barnett, an Indian, by contract conveyed property to the American Baptist Home Mission Society and the Equitable Trust Company of New York. The transaction was set aside in a suit by Barnett against the American Baptist Home Mission Society, and the Equitable Trust Company of New York. The American Baptist Home Mission Society alone appealed. In this case they moved to amend. A motion to dismiss for want of proper parties was duly made. The appellee claimed dismissal because the Trust Company was not joined in the appeal and that the time in which an amendment might be applied for and made, had passed. There was no severance of the two defendants. In denying a motion to amend and granting a motion to dismiss, the Court said:

"The federal cases also contain many statements which tend to support the argument that the court acquires no jurisdiction where a necessary party is neither bound nor severed for failure to join. See Estis v. Trabue, supra; Dohm v. Jennings, 139 U. S. 385, 388, 11 Sup. Ct. 584, 35 L. Ed. 217; Fitzpatrick v. Graham, 119 Fed. 353 (2 C. C. A.); Grand Island, etc. Co. v. Sweeney, 103 Fed. 342, 348 (8 C. C. A.); Capron v. Waldron, supra; Dodson v. Fletcher, 79 Fed. 129 (8 C. C. A.)."

In Siegelschiffer v. Penn Mutual Life Insurance Company *et al.*, 248 Fed. 226, the Court said:

"A motion was made to dismiss the writ of error on the ground, among others, that it was not taken within six months after the entry of the judgments sought to

be reviewed. The judgments in the Court below were entered on January 8, 1917. The writ of error was taken on July 9, 1917. The six months' period expired on July 8, 1917, which fell on Sunday. The question is whether the writ taken out on the following Monday was in time.

The question now presented to the Court has been passed upon by the Circuit Court of Appeals in the Eighth and Ninth Circuits. And in both circuits it was held that when the last day of the six month within which an appeal may be taken or writ or error sued out falls on Sunday, the appeal cannot be taken, or writ sued out, on the Monday following. The question was presented in the 8th Circuit in Johnson v. Meyers (1893), 54 Fed. 417, 4 C. C. A. 399. It then arose in the Ninth Circuit in Meyer v. Hot Springs Imp. Co. (1909), 169 Fed. 628, 95 C. C. A. 156."

In Boatmen's Bank v. Atchison, T. and S. F. Ry. Co., 2 Fed. (2d) 972, the time for suing out a writ of error expired on September 4, 1923. The petition for writ of error, assignment of errors and bond were filed October 17 following, but *nunc pro tunc* as of September 4, 1923. An order of appeal was thereupon made upon October 17, but *nunc pro tunc* as of September 4, 1923. A motion to dismiss the appeal was granted.

In Sprague v. Chicago B. & Q. R. R. Co., 17 Fed. (2d) 768, the doctrine in the case is summed up in the first and second *syllabi*, which read:

"Under U. S. Comp. St. sec. 1647, requiring appeal or writ of error to be taken within six months after decree, Circuit Court of Appeals is without jurisdiction to review judgment from which writ of error was not sued out for more than one year."

"Time provided by statute in which an appeal may be taken, or writ of error sued out, after entry of judgment cannot be extended by order of court."

In Priest v. Seaman *et al.*, 266 Fed. 844 (8 C. C. A.), the doctrine as stated in the caption is as follows:

> "To sustain an appeal from an order equally affecting several defendants, all must join in the appeal, or there must be a notice and severance."

In Dodson v. Fletcher, 78 Fed. 214 (8 C. C. A.), the appeal was dismissed because all parties to the judgment were not brought before the Court.

In Nathaniel Lord v. John W. Vensie, 8 Howard 249, 12 L. Ed. 1067, this Court, speaking through Chief Justice Taney, held as stated in the *syllabi:*

> "Where it appears to this court, from affidavits and other evidence filed by persons to a suit, that there is no real dispute between the plaintiff and defendant in the suit, but, on the contrary that their interest is one and the same, and is adverse to the interests of the parties who filed the affidavits, the judgment of the circuit court entered pro forma is a nullity and void, and no writ of error will lie upon it. It must, therefore, be dismissed."

In William A. Freeborn *et al.* v. Ship Protector, 78 U. S. 82, 88, 20 L. Ed. 47, a motion to *dismiss for want of jurisdiction* was based on the fact that the parties were not all named in the writ. Some of them were included in the designation. The procedure adopted was a motion to amend the petition on appeal, citation and bond. Amendment denied and appeal dismiss for *want of jurisdiction*, and the Court said:

> "The opinion of the court in the present case is, that no distinction in respect to the question before us can be made between the case of an appeal under the act of 1803 (2 Stat. at L. 244); and of a writ of error; and that the decisions referred to directing the dismissal of the latter from the docket for want of jurisdiction,

apply with equal force to the former. This result dis poses of the motions on the part of the appellant to amend the petition of appeal, citation and bond, and also the motion to amend the libel.

The motion to dismiss for want of jurisdiction granted."

In Wilson v. Kissel, 161 U. S. 248, 41 L. Ed. 422, appeal was dismissed because defendants necessary to, and directly interested in, plaintiff's appeal were not summoned and no severance was made, notwithstanding the fact that the omitted defendants in plaintiff's appeal were the ones who had also appealed. Plaintiff's appeal dismissed. This case is cited in Zollinc's Federal Appellate Jur. & Pro., p. 94.

It seems clear that, as held by the Court, on May 9, 1933, necessary parties were not made parties, and also that there was not sufficient data in the record filed by which to amend to name the necessary parties, and that, therefore, this Court has no jurisdiction of this appeal, and it was, and is, beyond the jurisdiction of the lower court to issue an alias citation, it is submitted that the citation should be quashed and the appeal dismissed.

Respectfully submitted,

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,

Attorneys for the Morans.

AFFIDAVIT

Now come the movants, Mrs. George D. Highight, Mrs. Anna Mae Hollinger, Messrs. John W. Hardy, S. W. Dearborn, O. W. Baugh, Joseph W. Delph, and William Dearborn, and being first duly sworn, state as follows:

1. They make this affidavit in support of their Motion to quash the citation filed herein on the fifteenth day of May, 1933.
2. That they are appearing specially before this Court and only for the purpose of said Motion.
3. That they are officers and members of the Gas Consumers League of Lexington, Kentucky, an unincorporated Society of more than six thousand in number, all customers of the appellant Company, and participated in all the proceedings herein named, on behalf of said organization and all other Gas Consumers of the City of Lexington.
4. That at all times during the years 1925 to and including the present time, close complex and strong interlocking conditions have existed between the appellant Gas Company and other power companies in Lexington, and the governmental, political and financial organizations in the said City.
5. The original gas franchise expired in October, 1925. Negotiations between the Company and others concerned, and the officials of the City were held behind closed and locked doors, the public and even newspaper men being excluded therefrom.
6. The citizens and gas consumers believed it necessary for their common welfare to organize, and as far as practicable, to control the granting of the new franchise to the Company.
7. That Wm. H. Townsend was Corporation Counsel of the City and at the same time was General Counsel for the Lexington Utilities Company, the Corporation which then, as now, owned the Gas distribution system in the City of Lexington, through which the appellant then, as now, delivered gas to its consumers; that said Corporation was then, as now receiving 12½% of the gross income of the Central Kentucky Natural

the Company owns, as rental for the distribution system, that said Utility was closely affiliated with and under common ownership with other utilities for which appellant's Counsel, H. P. Duncan, was then, as now, General Counsel.

8 That the gas rate, lower than fifty cents per M cu ft was under discussion by the City officials. They caused a preliminary draft of a lengthy franchise ordinance to be published. The ultimate rate provided was fifty, and, that militant action meetings held by citizens, caused its abandonment.

9 Another franchise was prepared by the City and enacted. This provided for a fifty rate and the pressure required was fixed at two ounces; four ounces being the minimum of efficiency in Lexington for ordinary use. The movants and others invoked the City Charter right of referendum, and upon the receipt of a Petition signed by some twelve thousand and five hundred voters of the City of Lexington, thereupon repealed the Franchise Ordinance.

10 The City prepared and enacted a second franchise, similar to the first. This also contemplated a sixty cent rate, or even higher. It also provided a pressure below the usual point for inefficiency in cold weather.

11 These movants invoked again the referendum. They had some nine thousand names to the Petition.

12 A conference was then held between these movants, a committee of citizens representing the City officials and the officials of the appellant. Mr. Duncan was one of its Attorneys in the conference. As the result of this conference, a second franchise was repealed, and immediately amended to give the consumers the right to become parties in all proceedings to fix or change rates and to preclude secret conferences and manipulations between the officials of the Gas Company and the City. It was then provided that meetings to discuss rates or changes in rates should be advertised in the official newspaper of the City, for five days before convening. To protect themselves against the inadequate pressure which the City was willing to allow the Company, the following was inserted . . . "*at all times a uniform and adequate pressure at the outlet of each customer's meter.*"

13. That under the Statutes of Kentucky, cities of the second class, which includes the City of Lexington, may be governed by the Commission form of Government, and provides for an initiative and referendum in regard to its legislation. The City of Lexington adopted that form of Government.

14. That by reason of Section 3255 c 1, of the Kentucky Statutes, conferring upon the citizens and voters, the right to subject municipal legislation to a referendum, the citizenship is the real governmental power of such a City and not the official Board of Commissioners. The Citizens of the City of Lexington, acting generally by and through these movants, created for themselves by the aforesaid Section 37, the right to become an actual party in all proceedings to fix gas rates in the City of Lexington, and to participate in all conferences having a fixation or change of rates in contemplation. The participation of the citizens in this movement, said to be made a party in the franchise, was made necessary by the decision of the Kentucky Court of Appeals in *Patton et al. v. Fayette Home Telephone Company*, in 155 Ky. 555, having there decided the parties to a franchise contract can at any time, by agreement, change the provisions thereof.

15. That to prevent the officials of the City of Lexington from changing the franchise and releasing the Company from any provisions in the franchise, that it might desire to be released from, caused the citizens, and particularly these movants to place in said franchise the aforesaid Section 37 to prevent any change in said franchise after its adoption by agreement between the City and the Gas Company alone.

16. That, after the amendment to said franchise, as set forth in Section 12, the same was purchased by the appellant, the Central Kentucky Natural Gas Company. These movants at once filed before the Railroad Commission of Kentucky, a petition to fix a just rate in Lexington.

17. The City of Lexington filed the petition before the Railroad Commission entitled, the City of Lexington and S. B. Featherstone v. Central Kentucky Natural Gas Company.

18 The aforesaid Railroad Commission declined to accept jurisdiction to hear the gas controversy from Lexington. These movants and some four hundred other persons instituted a Mandamus proceeding in the Franklin Circuit Court, requiring it to take jurisdiction and decide the rate controversy. They procured a Mandate from the Franklin Circuit Court. They file herewith, as part of this affidavit, a copy of the said Mandate and make same part hereof, marking same for further identification Exhibit "A".

19 That, thereafter, under the said writ of Mandamus, the said Railroad Commission assumed the jurisdiction of said controversy and called for hearing the various Lexington gas complainants.

20 On the 1st day of February, 1928, by agreement of all the parties in said controversy, the Railroad Commission of Kentucky entered an order directing these movants, as the Plaintiffs in the several proceedings to file their Petition in the action entitled, City of Lexington, *et al* v. Central Kentucky Natural Gas Company, and become parties therein.

21 That these movants appeared at every hearing and participated as actively as the state of the record required them to act in the trial of said rate case.

22 That during the proceeding in the said Railroad Commission, these movants and some 4,000 other persons filed their further motion to distribute all impounded funds by the said Commission.

23 That citizens in the City of Lexington and Gas Consumers thereof, other than these movants, filed their petition before the said Railroad Commission attacking the rate promulgated by the Gas Company, and seeking a reasonable and lower rate from the said commission.

24 That on the 9th day of October, 1929, the aforesaid Railroad Commission awarded to all complainants therein, a flat rate of 45c per M. cu. ft.

25 That thereafter the appellant filed its petition in equity in the District Court of the United States for the Eastern District of Kentucky to enjoin the said rate as confiscatory.

26. That in said proceedings it named as Defendants only the City of Lexington and the aforesaid Feather stone.

27. That it did not implead these movants or any of the said 5,000 other persons who were parties, who had intervened therein.

28. That the order of award of the said Railroad Commission, by its terms was to become final thirty (30) days after same was entered, unless suspended by the proper judicial proceeding.

29. That no injunction was sought or procured against these movants or said persons within the said thirty (30) days, nor at any time thereafter.

30. That these movants did appear in the District Court of the United States, become parties thereto, and participated in all the proceedings in the said Court, as the representatives of themselves and all gas consumers in the City of Lexington under the right conferred upon them by Section 37 of the Franchise Ordinance as written therein at the instance of these movants and the referendum proceedings herein before referred to.

31. That many citizens and gas consumers did not appear in the District Court, but stood upon the award as made by the Railroad Commission, and together with these movants are now undertaking to enforce said award, and to that end have instituted suit in Fayette Circuit Court in addition to the application made to the Railroad Commission for the distribution of the funds impounded therein, based upon its award of 45c.

32. That these movants and these persons will greatly be prejudiced and harmed if the Decree of the District Court of the United States appealed from by the appellant is disturbed or reversed.

33. That these movants and said persons waited until more than ninety (90) days had elapsed after the entry of the decree of the U. S. District Court aforesaid before bringing suit to enforce said award. They did not institute said proceeding until they knew that no appeal was being prosecuted against them and until their Counsel had been advised by the General Counsel of the Gas Company that they did not intend

to implead these movants, but had elected to proceed in this Court without making these movants parties thereto, and that they, as Counsel for the appellants had assumed the responsibility for their said procedure

11. That these movants and other participants in the litigation in the lower Court, and the Railroad Commission were not omitted as appellees by reason of any mistake, accident or oversight on the part of the Company, or its Counsel

12. That on the day of , 1911, a communication was addressed to the said the Company, and its Counsel, by the appellee acting by and thru its Counsel, Robt H. Winn and C. M. Harbison in which communication the attention of the appellant was called to the omission of Appellees from the said record That said communication was sent to Counsel for the appellant which said communication was received by appellant and reads and is in words and figures as follows.

Messrs Henry T. Duncan,
Lexington, Kentucky
D. T. Hazelrigg,
Frankfort, Kentucky

Gentlemen

Mr C. M. Harbison, Corporation Counsel for the City of Lexington, and I as specially employed counsel in the litigation of the Central Kentucky Natural Gas Company about the Lexington gas rates, desire to put ourselves upon record with respect to the following matter

The franchise contract out of which this litigation arises grants the right to any interested gas consumers of Lexington to intervene in this litigation

On September 15, 1911, in Order Book, page 300, of the Railroad Commission of Kentucky, appears this

"This day Grant E. Lally in the name of J. A. Edge and others filed a petition intervening in the above complaint"

In the United States District Court before the three judges on December 5th, 1929, this order was entered:

"On Motion of Mrs. George Higenight, et al, it is now ordered that the petition to be made a party herein tendered November 7, 1929, be and the same is filed and noted of record."

Your client, the Gas Company, is now in process of making up its appeal to the Supreme Court from the decree of the three judge Court. You have not made the parties referred to in the foregoing orders parties upon the appeal. Mr. Harbison and I, of course, have not any right to practice your side of the case, nor to decide for you whether these people are necessary parties upon the appeal. For the protection of the City, however, and its Attorneys, we feel constrained to make a record of the fact through this letter that we have brought the matter to your attention.

Yours very truly,

(Signed) Robert H. Winn
(Signed) Clinton M. Harbison

These movants say that there is now substantially $1,000,000.00 impounded with a designated custodian and that this impoundment arises from the impounding of the per M. cu. ft. from the time the Company ceased to collect 60c and commenced to collect 60c per M. cu. ft.

In addition to the fund arising from the said impoundment, there is in the possession of the said Corporation, a sum of $250,000.00 which it will be required to refund to the consumers if its appeal is dismissed, or the decree appealed from, affirmed. The appellant executed no appeal bond or *supersedeas* to protect these movants in their right to receive from it, the said $250,000.00 or more, of impounded funds, but which under the franchise in the record, it can be required to refund to them if the 45c rate of the Kentucky Railroad Commission is affirmed.

In January, 1932, Clinton M. Harbison, became Corporation Counsel of the City of Lexington, succeeding Wm. H. Townsend. The movants and other citizens of the City of Lexington did not believe that this change in the office of Corporation Counsel, improved in any manner, the conditions between the citizens and the Gas Company. They are informed, and believing their information to be true, say that the said Harbison is now, and was at the time he assumed the office of Corporation Counsel, and several years prior thereto, one of the company of gentlemen engaged in buying gas from the Petroleum Exploration Company, named in appellant's record, paying therefore 7½c per M. cu. ft. and it is the belief of these movants and the citizens generally, that this business connection incapacitated the said Harbison to fairly contend that the Central Kentucky Natural Gas Company should not receive 10c gas in the City of Lexington while his own Company engaged in selling gas for 7½c, and that said connection also incapacitated him from making complaint of the contract by which the Petroleum Exploration Company sold gas to the Central Kentucky Natural Gas Company at 10c per M. cu. ft.

J. W. Hamm,
O. W. Harvey,
J. W. Delaney,
Stanley Deanmoun,
William Deanmoun,
Mrs. George D. Hunnicutt,
Mrs. Anna Mae Hollingsworth.

[Jurat omitted in printing.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 11.

CENTRAL KENTUCKY NATURAL GAS CO., *Appellant*,

v.

RAILROAD COMMISSION OF KENTUCKY, ET AL., *Appellee*.

REPLY BRIEF FOR MOVANTS.

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
Attorneys for Movants.

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RAILROAD COMMISSION OF KENTUCKY, ET AL., *Appellee*.

REPLY BRIEF FOR MOVANTS

May It Please The Court:

Appellant today filed its objections to the motion to dismiss appeal. It presents four points or suggestions. As applied to this case they are unsound or not applicable.

(1) Citations are regularly signed by lower courts in regularly taken appeals. The records being still under its control and jurisdiction the statutes provides for such signing. The rule is otherwise after the record is removed by appeal.

Sipperly et al. v. Smith et al., 155 U. S. 86.
P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45.
United States v. Hooe et al., 1 Cranch C. C. 114.
(Affirmed 7 U. S. 73.)

(2) Movants were admitted as parties before the Rail road Commission and in the District Court standing in the record as made before the Commission.

This gave them all the rights of original parties.

The rule is stated at Section 2670 Cyc. Fed. Procedure, as follows:

> "Persons who have been allowed to intervene in a suit become parties thereto with all the rights and privileges which attach to the relation including that of prosecuting an appeal from the judgment or decree which affects their legal interests." (Cases fully cited.)

Zoline Fed. Appellate Procedure, Section 158, says:

> "Parties who were allowed to intervene may appeal." Ex parte Jordan 94; U. S. 248; 24 L. Ed. 123.

Sipperly et al. v. Smith et al., 155 U. S. 86, *supra*, presents a case where an intervener appealed without joining other parties to the suit. The appeal was dismissed.

(3) The position taken by appellant in this instance is out of harmony with its position on May 9th.

Then it said movants were not parties to the proceedings either before the Commission or in the District Court. Now it takes the position that its petition for appeal and order allowing same is all inclusive and includes movants This because the suit in the District named S. B. Feather stone "as representing all other persons similarly situated."

The parties to an appeal must be impleaded by name. General classifications and designations are not sufficient.

If the names are not in the record it cannot be amended to include them in a citation.

Estis v. Trabue, 128 U. S. 225-230, this Court said:

> "This Court cannot take jurisdiction of a writ of error which describes the parties by the name of a firm, or which designates some of the parties by the

expression '& Co.' or the expression 'and others' or in any other way than by their individual names."
Writ of error in the name of "Heirs of Nicholas Wilson" will be dismissed, as no person is named.
Wilson v. Insurance Co., 12 Pet. 140, 9 L. Ed. 1032.

A writ of error which describes parties by a firm name will be dismissed.

Godbe vs. Tootle, 154 U. S. 576, 14 S. Ct. 1167, 19 L. Ed. 831.

A writ of error which refers to parties "and others" is defective and should be dismissed.

Miller vs. McKinzie, 10 Wall. 582, 19 L. Ed. 1043.
Smyth v. Strader, 12 How. 327, 13 L. Ed. 1008.
Deneale vs. Archer, 8 Pet. 526, 8 L. Ed. 1032.

(4) A belated citation to a valid appeal is one thing, but a citation to a Court where there is no appeal, presents an entirely different aspect. Appellant now admits by its third point that its only chance to hold movants in its case is by claiming that they were brought in under the expression all other persons used in connection with S. B. Featherstone.

That it cannot do this is shown by the cases cited under section (3) hereof. When the Rail Road Commission and the District Court admitted movants as parties the aforesaid Featherstone no longer represented them. They represented themselves. General or class representation yields to personal and actual representation.

The order of this Court entered on May 9, 1933, declared that these movants were *not parties to the appeal*, and for that reason their application for leave to appear specially for purposes of moving to dismiss the appeal, and for leave to present such motion, was denied. Further, in that order it was declared that "On examination of the papers sub-

mitted by the applicants, and in view of the provision of the decree under review with respect to the distribution of the impounded funds the Court is of the opinion that the applicants *should be made parties to the appeal, and in order that proceedings for that purpose may be taken the hearing of the cause is postponed and the cause is assigned for oral argument on October 9, 1933.*"

Thus the Court in its order held that movants were not, when the order was entered, parties to the appeal, but that they should be made such parties if the appeal was to have effective standing before the Court. We would urge that the order did not undertake to declare that the appeal could be so perfected; but that it intended no more than that the appeal must be perfected as to movants, if the law, the decisions, and the state of the record would permit movants to be brought in as appellants before October 9, 1933. We urge that the law, the decisions, and the state of the record since that order was entered have not permitted the movants to be actually brought into the case as appellees; and certainly appellant has taken no proper step to bring them.

Appellant made not application to this Court to procure an order making appellees the movants. Only this Court would have jurisdiction to make such an order, and even this Court could not, as we believe, make such an order except in direct contradiction of its well established precedents and procedure.

The state of the printed record does not disclose the movants as parties therein and thereto; hence even this Court cannot now make them appellees.

On July 11th, 1933, appellant served the notice found on page 15 of its brief. Counsel was familiar with Section 3, Rule 12. It relates to procedure between parties to an appeal.

Upon receiving this notice counsel for movants ascertained from the office of the clerk of this Court that no application had been made for an order making movants

parties, and that their status was the same as on May 9th when this Court declared them not to be parties.

In these circumstances it was deemed the better procedure to do nothing that might constitute a general appearance. Proceeding under Section 3, Rule 12, would have constituted an appearance in the case.

The movants very naturally desire to protect their interests in this vital rate controversy, and wish to avail themselves of every appropriate means of defence. They have believed that nothing that has been done by the appellant has perfected the appeal as to themselves; and they have realized that the appellant, through its deliberately planned strategy, sought upon this appeal, to ignore, completely, the movants and the thousand of other gas consumers associated with them, and undertook to keep from this court any knowledge or information touching the fight made by the movants and their associates before the Railroad Commission and the lower court. Hence they have felt that they were under no obligation to aid the appellant in perfecting the appeal. They entered into no agreement about the omitted record, because any such agreement might have entered their appearance upon the appeal. They have not conceived it to be their duty to aid the appellant in curing a situation which the appellant in a most arbitrary, unfair, unjust, and sinister spirit—as movants have regarded it—brought about. If the appellant, in its effort to win the appeal had kept from the court the full record; had failed to bring in the movants as parties to the appeal; had waited too long to permit an amendment of the appeal by their inclusion as appellees,—why should the movants surrender this advantage to themselves which had come about solely through the unusual and selfish course pursued by the appellant? If it may have developed that appellant has been hoist by its own petard, why should movants perform the work of unhoisting?

Therefore, the movants took no action in regard to the citation recently served on them; they have entered into no agreement with appellant as to the omitted record. There has been no severance of them below and this court has held that they are necessary parties to the appeal; necessary if the appeal is to be maintained. No bond for costs to them has been executed; this court has made no order making them appellees. Why should they, in the light of this situation, surrender their rights, and of their own volition, make themselves appellees? Had the appellant included them as original appellees, the entire record would have been before the court when the case was called for argument last May, and the appeal would have been then disposed of.

If, however, the theory of the case held by movants should be deemed by the court erroneous; if the court should enter an order making or declaring them appellees,—then, they would respectfully submit, the appeal cannot be properly heard or considered unless or until the omitted record is supplied; and the ends of justice will require further continuance of this appeal.

Appellant today filed the affidavit of Mr. Tonkin made at Lexington October 4th. Shortness of time prevents an answer to its contents further than to say that except in a few minor statements it is uncandid and partly untruthful. It is within the knowledge of the Lexington counsel that Mrs. Hollinger, Mrs. Berkly and Mrs. Taylor and Mr. Delph are gas consumers and have been such at all times during this controversy. If permitted their affidavits and bills will be filed.

The court is told by the affidavit that the city employed Judge Winn, an outstanding member of the Bar in December, 1926, and that thereafter all the gas consumers were satisfied, etc., when in point of fact that distinguished jurist was employed as early as January, 1926. All the preceding events mentioned by movants in their affidavit on page 23 took place after he came into the case.

It is respectfully submitted that the motion to dismiss should prevail. There is a defect of parties. The defect cannot, is not subject to correction under Section 873 U. S. C. A. The records submitted disclose that many parties other than movants were parties in the Railroad Commission, that none of these parties were joined in suit in the District Court. Such parties will not be bound by the action of this Court as they are not before it.

If, however, the Court does not dismiss the appeal, it would seem to be proper to so phrase the mandate as not to affect the rights of parties not before it to enforce their rights against the Gas Company in the various litigations referred to in sections 31-32 and 33 of the affidavit on page 27 of movants' motion to dismiss filed herein.

Respectfully submitted,

MAURICE H. THATCHER,
JOSEPH A. EDGE,
JOHN H. CONNAUGHTON,
RAYMOND M. HUDSON,
Attorneys for Movants.

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IN THE

Supreme Court of the United States

October Term, 1933

No. 11

CENTRAL KENTUCKY NATURAL GAS COMPANY - - - *Appellant*

vs.

RAILROAD COMMISSION OF KENTUCKY, MOSES R. GLENN, OSCAR VEST, and JAMES HATCHER, Members Constituting said Railroad Commission, BAILEY P. WOOTEN, Attorney General of the Commonwealth of Kentucky, City of Lexington, a Municipal Corporation and S. B. Featherstone, individually and as representing all other persons similarly situated, - - - - *Appellees.*

BRIEF FOR APPELLEES

Mrs. George Hignight, Mrs. Wellington Payne, Mrs. Anna Mae Hollinger, Mrs. Gladys Berkley, J. W. Delph, Stanley Dearborn, William Dearborn, P. P. O'Neill, Mrs. Margaret Taylor, R. T. Childers, Nancy Bell Henderson, and H. E. Stevens, et al.

INTRODUCTORY.

In behalf of the above-named Appellees, we desire to submit for consideration, certain matters of law and fact.

First, we will discuss the legal phases involved, and then we will take up the question of fact, as regards the rate issue.

2: REGARDING MOTIONS TO DISMISS APPEAL

Touching the motions heretofore made by these Appellees for dismissal of the appeal, we would respectfully suggest that those motions were presented before we were made parties Appellee by the Court. Now, that we have been made such Appellees, if, with propriety we may do so, we desire to raise anew the suggestion that because of the failure of Appellant to include us as Appellees, and within the time prescribed by law, and the rules of this Court, the appeal should yet be dismissed. (See Brief on the indicated motions and the authorities therein cited.) Under the decisions, the Court upon its own motion, when the record discloses the facts, justifying the action, may dismiss the appeal. (See cases referred to in Brief.) The supplemental record now before the Court, brought up, as a result of our being made Appellees, fully sustains our contention. We, these Appellees, are necessary parties upon appeal, but not having been made Appellees within the duly prescribed time, the dismissal of the appeal would now seem proper. A refusal so to dismiss when we only appeared specially, would not, as we believe, preclude

a dismissal after our formal inclusion as Appellees, with the bringing up of the omitted record, showing that no proper determination of the issues involved in the appeal, could be made without our being parties thereto.

In this connection, we would call the attention of the Court to the fact that, in addition to the parties named in the motion to dismiss, and deemed by the Court as necessary Appellees, there are, as shown by the supplemental record, four thousand other gas consumers of Lexington who were parties before the Railroad Commission, and who are interested in the impounded funds, and who have the same rights upon appeal as have the Appellees, named in the indicated motions. These four thousand gas consumers, have not been in any formal way, made parties to this appeal. (See supplemental record Mss. 3 and 4, and Printed Record 9.)

It is true that the movants named in the motions to dismiss the appeal intervened in the District Court, and were made parties in the District Court proceedings, while the other four thousand did not specially intervene in that Court, and were not by that Court specifically named as parties in the District Court proceeding. If, in fact, they are necessary Appellees, we would point out that it was the Appellant's obligation to bring them, first, in the District Court, and later, into this appellate proceeding.

3: THE COURT'S JURISDICTION UNDER RAILROAD COMMISSION ACT

In the District Court, these Appellees formally objected to the Court's jurisdiction to hear and determine the issues raised in this proceeding. These objections were based upon sections 201e-14 and 201e-17, Kentucky Statutes (Kentucky Acts of 1920, Ch. 61, p. 250, sec. 14), which provides as follows:

> Sec. 201e-14. COMPLAINTS OF EXTORTION AGAINST CARRIERS; COMMISSION TO HEAR; RATES TO BE FIXED; VIOLATION OF ORDER, PENALTY FOR; VENUE OF PROSECUTION; LIMITATION; DEPOSITIONS OF WITNESSES; PRODUCTION OF DOCUMENTS; PENALTY FOR FAILURE TO PRODUCE.—When complaint shall be made to the Railroad Commission accusing any * * * or natural gas company, mentioned in this act of charging or collecting or receiving extortionate rates * * * in this Commonwealth, or for the distribution, furnishing or sale of natural gas in this Commonwealth, * * * it shall be the duty of said commission to hear and determine the matter as speedily as possible, * * * Said commission shall give the Company complained of not less than ten days' notice * * * and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company is or has been guilty of extortion, said commission shall make and fix a just and reasonable rate * * * The rate fixed by the commission shall be entered and be an order on the record book of their office signed by the commission, and a copy thereof mailed to an officer or agent of the company affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should such company * * * charge, col-

lect or receive a greater or higher rate * * * than made and fixed by the said commission, * * * said company * * * shall each be deemed guilty of extortion and, upon conviction, shall be fined for the first offense in any sum not to exceed one thousand dollars; and upon a second conviction in any sum not to exceed two thousand dollars; and for a third and succeeding convictions in any sum not to exceed five thousand.

The circuit court of any county into or through which the line or lines of such company runs, and the Franklin Circuit Court, shall have jurisdiction of the offense * * * and the circuit court of any county where such offense may be committed * * * be by indictment or penal action, and shall be commenced within two years after the offense * * *

Sec. 201e-17. COMMISSION TO ENFORCE THIS LAW; PRACTICE; COURT PROCEEDINGS TO ENFORCE COMMISSION'S AWARD; NO NEW EVIDENCE HEARD; PROCEEDINGS AS IN ORDINARY CASES.—It shall be the duty of the Railroad Commission to see that every provision of this act is carried out, * * * The commission shall hear and reduce to writing all evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award and the evidence heard in the office of the clerk of the circuit court of the county which, under the code of practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued as in the other cases against the party against whom the award shall have been rendered, requiring said party to appear in the court within the time allowed by ordinary cases and show cause why said award shall not be satisfied. If such party fails to appear judgment shall be rendered by default, and the same proceedings had thereon as in other ordinary cases. If a trial is demanded the case

> shall be tried in all respects as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission except such as the court may be satisfied by sworn testimony could not have been procured before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be at the same time, the same as in ordinary cases. (1920, c. 61, p. 250, sec. 17.)

Thus, Kentucky Statute 201e-17 specifically sets forth the procedure that must be followed by the Railroad Commission upon deciding a rate question, and also prescribes the procedure that must be pursued to enforce its order. In the instant case, an order was entered by the Railroad Commission, after determining the rate, extending for thirty days, the time in which enforcement of the rate, thus fixed, might be made. Before the ten days statutory period for lodgment of the commission record with the statutory court elapsed, that is to say, on the ninth day after the entry of the rate order, the Appellant, wholly ignoring the statutory procedure involved, filed its petition in the U. S. District Court, for the Eastern District of Kentucky, praying an injunction against any action of the railroad commission thus to lodge its record with the circuit court, to the end that enforcement of such rate order, or a new trial on the rate issue, might follow.

It is well settled that statutory provisions of the indicated character are valid. The Appelant chose to disregard those provisions in its effort to resist the rate fixed by the commission, and undertook to substitute its own plan of pro-

cedure for that fixed by law and the franchise contract. It did not permit the case to go into the prescribed State Court for a further trial and determination. It chose a method not prescribed or permitted by statute. Before the commission's report was even allowed to mature, Appellant went into the United States District Court and procured an injunctive process having for its purpose and effect, the stoppage of all further functioning of the statutory provisions in question.

Such irregular procedure, we submit, if permitted to prevail, sets aside the duly constituted procedure created by the State, and the franchise contract, for fixing rates. If every effort to adjust gas rates in Lexington, under the franchise contract, is to be attacked in this manner, the franchise provisions in question become nugatory, and endless costs and confusion must result, because under those provisions adjustment of the rates may be made every three years.

Referring to rate orders by the Kentucky Railroad Commission, the fact should be kept in mind that under the statutory provisions, covering the subject, the Commission itself, has no power of enforcing any rate fixed by it; and if the same be not accepted, or acquiesced in, by the utility involved, only the State Circuit Court can, after a new trial of the question, make enforcement of that rate, unless the court shall reject the rate; in which event the case is remanded to the Commission for further proceedings. Any subsequent rates fixed by the Commission must, in turn, be submitted, as in the first instance, to the Circuit Court for hearing and

action. See L. & N. R. R. Co. v. Greenbrier Distillery Company, 170 Ky. 775, wherein the Court, speaking of the power of the Railroad Commission, said:

> "It gathers and preserves the evidence necessary upon which to base judicial action. It collates the facts and sums up the results from the basis from which it acts, and this is presented to a court for review, with ample opportunity for each party to have his day in court before the matter is determined, and the questions between the parties are determined alone by the court. The act of the commission in making a reparation award has no enforcible effect, until it is determined by the court, that its report of the results of its investigation is correct."

In the case of Standard Computing Scale Company v. John F. Farrell, 249 U. S. 571, the court said:

> "But since the 'specification' is not in the nature of a law or regulation, the prohibitions of the Federal Constitution cannot apply."

In the case of Prentis v. Atlantic Coast Line Company, 211 U. S. 208, Chief Justice Fuller in concurring, said:

> "In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their faces that the Appellees did not avail themselves of the right of appeal to the Court of Appeals of Virginia, which was absolutely vested in them by the Constitution and laws of that Commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed."

In the case of St. Paul Gas Light Company v. City of St. Paul, 181 U. S. 142, the Court said:

> "* * * no legislative act is shown to exist, from the enforcement of which an impairment of the obligation of

the contract—within the purview of the Constitution—did or could result."

In the case of Dalton Adding Machine Company v. The State Corporation Commission of Virginia, 236 U. S. 699, the Court said:

> "The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly."

We would point out that all the charges of arbitrary conduct on the part of the Commission were denied by the answer as was the charge that the rate announced was confiscatory. (R 53-56.)

Appellant failed to introduce proof of its charges. It failed to show a confiscatory aspect to the Commission's award. It failed for the all-sufficient reason that the Statutes of Kentucky does not confer on the commission power to enforce its awards nor fix any penalization until award is accepted by the utility or approved by the Court — Kentucky Statutes 201e-17. The franchise contract provides for a temporary rate and impoundment of funds until finality to the making. No penalties could accrue against the Company until that time.

The District Court properly refused permanent injunction sought by Appellant.

4. DATE CERTAIN FOR RATE-MAKING

December 31, 1926, was agreed on by all the parties as the date certain before the Railroad Commission for the determination of a just and reasonable rate. Appellees made no agreement for the introduction of testimony concerning any gas purchases, contracted for subsequently to that date. Hence, no such testimony should be considered in determining the rate. We speak with special reference to the alleged contract of Appellant with the Petroleum Exploration Company.

The record made up before the Railroad Commission constituted the record upon which the case was tried in the District Court. Hence, all the parties and the District Court itself, were bound by the date, December 31, 1926. Furthermore, it is to be noted, as the Court states in its opinion (R. 85, 90) the parties litigant requested the Court to accept December 31, 1926, as the date certain upon which it should determine the question at issue. It is clear, therefore, that all the parties are bound by that date.

5. PETROLEUM EXPLORATION CONTRACT

The taking of testimony commenced on March 14, 1928. The contract between the Central Kentucky Natural Gas Company and the Petroleum Exploration Company was dated March 24, 1927. Therefore, because December 31, 1926, was by agreement, made the date certain for the trial of the case before both the Railroad Commission and the

lower Court, the Petroleum Exploration Contract should be excluded from consideration.

The franchise required Appellant to construct and maintain a second pipe line to an adequate gas field in Kentucky or West Virginia, section 23 (R-36.)

These Appellees contend that the making of a contract for the supply of natural gas with the Petroleum Exploration Company, for delivery at the gates of Lexington, is not a fulfillment of the contract as provided in Section 23, in that said section contemplates the construction, or the causing of the construction, of a suitable pipe line to the gas fields of West Virginia or Kentucky, to procure an ample supply of gas, and the complete management and control of said pipe line to vest in the Appellant.

This requirement certainly was not met by a mere contract between the Appellant and some independent producer. The gas line of the Petroleum Exploration Company, or any other independent producer, might be prevented from furnishing gas to the City of Lexington under any contract with the Appellant in case of insolvency, receivership or similar proceeding, as affecting the company; or, in the event of dissolution by mutual agreement of the contract between Appellant and the independent producer. On the other hand, if the indicated pipe line should be constructed by the Appellant, as provided for in the franchise, the same would constitute an asset which could be utilized as fully as any other of its assets under any conditions which might arise for the fulfill-

ment of its contract with the city to furnish an adequate supply of gas. Therefore, these Appellees believe that the contract of the Appellant with the Petroleum Exploration Company in no wise fulfills or discharges its obligation to the City of Lexington in the indicated manner.

In this connection, it may be pointed out that the right of the Appellant to charge an additional ten cents per M. cu. ft. of gas was based upon the condition precedent that Appellant would build and maintain such additional pipe line. For this reason, the lower Court was altogether justified in holding the 10c per M. cu. ft. in excess of 50c should be refunded to the gas consumers.

6. APPELLANTS' ASSIGNMENTS OF ERROR UNSUPPORTED

There is nothing in the record in support of Assignments of Error I – II – III – IV – V – VI – IX – X – XI – XV – XVII – XVIII.

Assignment VII is particularly objectionable in making assertions of fact, unsupported by the record. The attention of the court is invited to the following assertions:

> That existent line was not of sufficient capacity to comply with franchise contract.
> That Petroleum Exploration Company had developed a considerable gas field, etc.
> It was contemplated and understood at the time of said franchise that plaintiff would be required to have begun etc., a line from said Owsley County to Lexington, etc.
> It was further known and understood by the parties that

the plaintiff * * * to secure * * * additional pipe line * * * and delivery of an adequate supply of gas * * * by the Petroleum Exploration Company.

That in compliance with the franchise entered into a contract with said Petroleum Exploration Company to purchase 750,000,000 cu. ft. of gas and to pay 40c per M. cu. ft. therefor.

That the consideration for the increase of said temporary rate from 50c to 60c was the construction of a line from Lexington to the Owsley County field, etc.

That a further consideration for the increase in said rate was the additional cost of the plaintiff for the gas purchased under its contract with Petroleum Exploration Company.

That said * * * rate of 50c was increased to 60c as of December 1, 1927, and * * * plaintiff was required to purchase 750,000,000 cu. ft. of gas at 40c per M cu. ft. per annum.

These allegations introduce important considerations. Had they been presented to the Railroad Commission, and established by proof, or allowed to pass unchallenged, these Appellees could not complain. But these claims were not made there. They cannot be asserted here. The fixing of December 31, 1926 as the date certain for rate-making, made it unnecessary for these Appellees to inquire into the integrity of the contract with the Petroleum Exploration Company, or the reason that actuated the Appellant to pay that Company 40c per M. cu. ft. at that time.

THE MERIT OF THE CONTROVERSY

Something about the witnesses

This discussion will be limited to the qualifications of the witnesses, John T. Kimball and James A. Yunker who appeared for Appellant, and Lucien E. Beckner who appeared for the Appellees, to testify on the matters at issue, and the weight to be given to their testimony.

JOHN T. KIMBALL qualifies (R. 111) as an experienced valuation engineer and accountant. He does not qualify as a trained and experienced geologist. He does not qualify as a practical natural gas man,—one who is trained by experience in the exploration of natural gas-bearing lands. He does not qualify as being trained and experienced in the production of natural gas, and the transmission and distribution thereof. He does not qualify as an economist, a banker or a financier.

JAMES A. YUNKER testifies that he is 39 years old. In Appelant's original Brief, p. 81, Appellant states that James A. Yunker is a *practical* and experienced gas engineer; that he filed Exhibit "Yunker No. 1" entitled "Gas Reserves in Eastern Kentucky," and, that "since this Exhibit, and Yunker's testimony is not essential to this appeal, they were omitted by the appellant in its Statement of Evidence." At (R) (Mss 34). Cross-examination, the witness stated that at the time the report just referred to was made, he was head of the Geological Department of the Louisville Gas and Electric Company; that he is not a geologist; that he has not attended any geological school; that he has no training as a geologist. He stated that Mr. Beckner is a Consultant Geologist for the Louisville Gas and Electric Company.

LUCIEN M. BECKNER testified (R. 197) that he had been engaged in geological work for about twenty years; within the past ten or fifteen years for the Atlantic Re-

fining Company, and the Superior Oil Corporation, the Louisville Gas and Electric Company, the Texas Oil Company and some smaller companies to determine geological conditions favorable or unfavorable for the production of oil and gas in Indiana, Mississippi, Texas, Oklahoma and Kentucky, principally in Kentucky; that he had occasion to investigate the natural gas reserves in eastern Kentucky fields; that he had traveled through its fields for a period of thirty odd years; that he knows practically all of that territory.

The trial Court did not have the benefit of seeing any of these witnesses, or hearing them testify from the witness-stand, especially Mr. John T. Kimball, when he presented his conjectural claims with respect to the value of the properties, for Cost of Financing, Amortization and Extraordinary expense and generally, his willingness to testify upon belief rather than actual knowledge and experience.

THE RATE BASE

The Appellees accept the finding of the Court (R. 83) of $1,586,880. as the value (Rate Base) of that part of Appellant's property allocable to Lexington, Kentucky. However, because the Court obviously was over-generous in accepting as value "the fair reproduction cost" of the Lexington Utilities property (R. 84) we are constrained to suggest that said cost of $611,227. includes $26,650. "Organization Cost," Mss. 10 (R. 16). That amount is equivalent to 5-1/2% of the depreciated reproduction cost of $481,166. In Des Moines Gas Company v. Des Moines, 238 U. S. 153 on a depreciated reproduction cost of $1,937,402, the Master

allowed for Organization Expenses, $6,923. This amount, $6,923. is equivalent to less than (½%) one-half percent of the depreciated reproduction cost. The Master defines organization expense, as:

> "Time and money expended in the promotion of the enterprise, and the organization of the company and interesting capital therein, including, also, legal expenses, obtaining the necessary franchise, as well as the cost of incorporating the Company."

At (R 82. 83.) the trial Court said: "*Much of this evidence is conjectural*" which is apposite respecting the inclusion of approximately 5-½% of the reproduction cost of the Lexington Utilities property, for organization costs, as reflected by $26,500. We submit that this item should be reduced to an amount not exceeding $6,923.

Furthermore, included in the $611,227. is "Cost of Financing" $25,797. (R 16.) We submit that this item should be excluded entirely as forming any part of the reproduction cost accepted by the Court, because there is no evidence, Mss. 12. 13. (R .) that such cost was incurred, or that it necessarily would be incurred in the event of re-construction. Galveston Electric Company v. Galveston, 258 U. S. 388; Wabash Electric Company v. Young, 53 S. C. Reports 234-237; 36 Fed. (2) 254; 58 Fed. (2) 266, approved by this Court in Los Angeles Gas and Electric Company, Appellant v. Railroad Commission of State of California, et al.

Should the Court adopt this suggestion then the depreci-

ated reproduction cost of the Lexington Utilities property, accepted by the Court (R. 84. 85.) at $611,227. should be adjusted by the difference between $26,650. and $6,923, namely: $19,727 and total elimination of Cost of Financing by $25,797., viz:

Value of Lexington Utilities property as accepted by the Court		$611,227.
Less Excess Organization Costs	$19,727.	
Less Cost of Financing	25,797.	45,524.
Reproduction cost (Depreciated as of Dec. 31,: 1926.)		$565,703.

It is submitted that in as much as the original cost of the Lexington Utilities property as of December 31, 1926, was $383,153. (R. 229), following the rule in Smyth v. Ames, 169 U. S. 460. 547, and Georgia Railway & Power Company v. Railroad Commission, 262 U. S. 625; McCardle v. Indianapolis Water Company, 272 U. S. 400, the fair value, or rate base of said property should not exceed $500,000.

AMORTIZATION

"Amortization is the extinction of a debt through a sinking fund." (Standard Dictionary.)

In the instant case, it may be defined as the return to the stockholders of appellant of his investment in addition to the payment of operating expenses, repairs and replacement of

property, compensation for the use of capital in addition to other large reserves. (See R. 213. 217. 225, respecting reserve funds.)

Appellant would use it as a process to force consumers to pay for the 100% maintained properties belonging to it, and also the property belonging to the Lexington Utilitie Company and yet leave ownership and control in the hands of appellant, and after the amortization, either in part, or, as a whole, permit the same stockholders to keep right on collecting returns upon the investment, for which they had been fully, and sometimes doubly, repaid. The record, Mss 13. 14. 15. (R. 16), shows that under the twenty-year franchise, which expired September 5, 1925, appellant was able to retire, out of earnings a bond issue of at least $600,000., and pay to its stockholders, dividends aggregating $1,215,000., on an investment of $1,582,975., after payment of rentals for the use of Lexington Utilities Company property, the actual cost of which was $383,153., as of December 31, 1926. (R. 229.) (Jirgal's testimony.)

The trial court (R. pp. 87-8) in its opinion, made annual allowance as deductible by appellant each year as expense to determine income available for interest and dividends,

1.—($50,000.) per year for amortization of its own properties used in the service of the Lexington, Kentucky district.

2.—($10,263.) per year for amortization of the Lexington Utilities Company's distribution system *leased*

by, and not owned by, the appellant. (See leasing contract printed in a separate pamphlet as an addendum to the R. pages 267-273.)

The laws of the State of Kentucky make no provision for amortization of natural gas utilities and the Railroad Commission of Kentucky is without authority to take it into consideration in the ascertainment of values and the fixation of rates of natural gas service.

The terms of the franchise, which, as stated in appellant's original brief, page 3. "were the result of advance agreement between the City and the Company, and was drawn to fit the situation and facts affecting the appellant," do not provide specifically, or by implication, that the rates to be fixed, as therein set forth, should include as a part of the cost of the service, an amount sufficient to amortize appellant's property, or any part of the property used in the service, during the life of said franchise, or, at any other time.

Appellant's witness, John T. Kimball, whose qualifications have heretofore been set out, predicates appellant's claim of amortization upon three hypothesis, as follows:

1.—"It is a longer period of time than any conservative investor or banker would consider for sinking fund purposes on securities issued against a natural gas enterprise."

2.—"It is impossible to foretell with any degree of accuracy, the life of a natural gas field, especially those of West Virginia and Kentucky. Some of these fields, depending on the rate of depletion, go down very rapidly; others, not drawn on so rapidly,

continue for a longer time. The life of the field, depends not on how much is in the field, but on how much is withdrawn, not only at the present time, but during the future years. Thus, it is a very difficult thing to estimate the natural life of a natural gas utility. You know there is gas there to be sold, but how long it will last, is hard to tell. You can go out and determine with fair accuracy how much gas is in the proven acreage, but to tell whether they will find a new field tomorrow, which will change your entire conclusion, is impossible; so I believe an estimate of this kind should not be predicated on a longer period of more than twenty years over which the Company should recover back the money, put in its equipment, etc."

3.—"The third element I have considered, is for a twenty year period, and at the end of the twenty year period, the Company has no rights whatever in the streets of the City or Lexington, or to serve the consumers therein."

A *hypothesis* may be termed—"*a comprehensive guess; loosely and generally, an unsupported theory; a guess or conjecture.*" (Standard Dictionary.)

These appellees contend that Mr. Kimball's first hpyothesis is not at issue, and were it, the witness is not qualified to testify thereon.

Respecting the second hypothesis, the definition of a hypothesis, as just above stated, would be about as good an answer as can be made, save that the witness entirely overlooks the fact that the Central Kentucky Natural Gas Company, appellant here, may not be considered a natural gas producing utility, therefore, these appellees say

that Kimball's comprehensive guess and unsupported theory, should have been disregarded by the trial Court, and ought to be, and doubtless will be, disregarded by this Honorable Court.

The importance of the question of saddling upon the gas consumers, not alone in Lexington, but in all the communities served by appellant, is too great, in our view, to be treated lightly by these appellees, or by this Honorable Court.

As bearing on the third hypothesis, namely: that at the end of the twenty year period of the franchise, appellant would have no rights whatever in the streets of the City of Lexington or to serve the communities therein. Appellee's desire to say that such claim is untenable, because its right to conduct business in the City of Lexington, after the expiration of the franchise, need not cease. Acts 1920, c. 61, p. 250, Ky. Stats. Sec. 201e-23 of Railroad Commission Act which provides:

> "If upon the expiration of the franchise of any natural gas company, which continues in the service without obtaining a new franchise, such company shall be subject to the jurisdiction and authority of the Railroad Commission and shall not withdraw its service from any municipality, county, or communities without obtaining permission from the Railroad Commission so long as it remains in business in the State of Kentucky, or any part thereof."

This section was upheld in United Fuel Gas Co. v. Railroad Commission of Kentucky, et al., 13 Fed. (2) 510, affirmed 278 U. S. 300, also, City of Ludlow v. Union

Light, Heat and Power Co., 231 Ky. 813. 816. 817.

Appellant voluntarily placed itself under the jurisdiction of the Railroad Commission, under Section 4 of the franchise. Obviously, it will do so, upon the expiration of the franchise if unable to make a satisfactory contract with the City of Lexington, at that time, and thus operate under an indeterminate franchise, with all of the advantages and none of the disadvantages already experienced in the first five years of its life.

Turning to the discussion of Mr. Kimball's second hypothesis, these appellees assert that appellant is not a production, transmission and distribution natural gas utility, but simply a distributor of natural gas; that it purchased during the years 1922 to 1926, both inclusive, more than 90%, and produced less than 10% of the gas that it distributed and sold in the State of Kentucky. (R. 118-a.)

That appellant is not a producer of natural gas is further evidenced by the fact that it contracted with the Petroleum Exploration Company in its effort to comply with Section 23 of the franchise, and if further evidence were necessary that appellant is not a producer of natural gas, to an extent worthy of consideration, we bring to the attention of this Court, appellant's investment in its 'Production System Property', which is shown by page 31 of Kimball Exhibit No. 1, following:

Central Kentucky Natural Gas Company, Inc.
Summary Classified by Accounts

Classification	Estimated Cost of Reproduction as of Dec. 31, 1926. New	Less Deterioration
Organization Costs	$101,600	$101,600
Production System Property:		
Menifee Field—		
Leaseholds	$ 1,975	$ 1,975
Stored Gas	409,663	409,663
Rights of Way	4,971	4,971
Gas Wells	137,800	110,240
Field Lines	169,883	166,486
Other Equipment	532	532
Total Menifee Field	$724,824	$693,867
Red Bush Field—		
Leaseholds	$ 17,875	$ 3,575
Measuring Station Structures	840	699
Measuring Station Equipment	4,135	3,722
Gas Wells	71,132	21,925
Field Lines	37,051	35,939
Total Red Bush Field	$131,033	$ 65,860
Total Production System Property	$855,857	$759,727
Transmission System Property:		
Menifee Compressing Station—		
Land Owned in Fee	$ 100	$ 100
Structures	32,796	26,784
Stable Equipment	210	210
Equipment	152,165	117,613
Total Menifee Compressing Station	$185,271	$144,707
Red Bush Compressing Station—		
Structures	$ 14,759	$ 13,184
Equipment	54,543	50,155
Total Red Bush Compressing Station	$ 69,302	$ 63,339

By page 34, Kimball's Exhibit No. 1, following, we also show Reproduction Cost of all appellant's property, including its 'Production System Property.'

Central Kentucky Natural Gas Company, Inc.
Summary Classified by Accounts

Classification	Estimated Cost of Reproduction as of Dec. 31, 1926 New	Less Deterior ation
General Property:		
Oil City, Pa.		
Office Furniture and Fixtures	$ 1,785	$ 1,509
Construction Overheads:		
Engineering during Construction	$ 131,011	$ 125,557
Legal Expense during Construction	38,298	38,298
Administration Expenses during Construction	59,258	59,258
Taxes, Insurance and Damage during Construction	25,532	25,258
Interest during Construction	199,115	177,870
Total Construction Overheads	$ 453,214	$ 426,515
Cost of Financing	$ 146,028	$ 146,028
Miscellaneous Intangible Capital:		
Going Concern Value	$ 248,000	$ 248,000
Cost of Obtaining New Franchises	50,000	50,000
Total Intangible Capital	$ 298,000	$ 298,000
Working Capital:		
Materials and Supplies	$ 6,551	$ 6,551
Cash Required for Operation	76,449	76,449
Total Working Capital	$ 83,000	$ 83,000
Total Property	$4,044,723	$3,669,400

According to page 31 of Kimball's Exhibit No. 1, the Reproduction Cost Depreciated of appellant's Production System Property as of December 31, 1926, was $759,727., inclusive of 'Over-head Charges,' and without deducting salvage of $28,050. as shown at page 33, Kimball's Exhibit No. 4. Included in said $759,727. is Red Bush Field, Gas Wells and Field Lines aggregating $57,864. which on said page of Exhibit No. 4 are given a remaining life of two years. That sum includes the item of stored gas $409,663. After deduction for stored gas, the net Reproduction Cost Depreciated of the total Production System Property as of December 31, 1926 is $350,064. For good measure, we add 15% 'Construction Over-head Cost' in the sum of $52,510. which results in a total Reproduction Cost Depreciated of said Production System Property of $402,574.

The trial Court fixed the value of appellant's total property at approximately $1,587,000. This sum is equivalent to 43% of $3,669,400. shown by page 34, Kimball's Exhibit No. 1, as the Depreciated Reproduction Cost of appellant's total property. Applying that percentage to the $402,574. total Production System Property results in approximately $174,000., as the value of Appellant's Production System Property, applicable to appellant's business as a whole; and apportioning the aforesaid $174,000. to the Lexington service, using the Court's percentage of 55.1%, results in the sum of $95,875. for Production System Property as useful in the production of natural gas for the service of Lexington. *This*

should convince the Court of appellees' contention that appellant is not a natural gas producing utility.

Appellant did not produce as a witness, one qualified by training and experience as a geologist and practical gas man to support Mr. Kimball's hypothesis. The reason is obvious. As it shown here, the extremely small amount of Production System Property now owned by appellant, and devoted to the production of less than 10% of natural gas, has long since, (R. 213. 217. and 225.) been amortized, and the Lexington consumers of gas have borne their proper share thereof.

The burden of proof was upon appellant to show by competent testimony, that it is a producer of natural gas and not simply a purchaser and distributor of gas. Mr. Kimball's testimony does not measure that requirement.

It may be assumed that the Columbia Gas & Electric Corporation purchased appellant's property as a permanent investment, as well as an additional outlet for natural gas produced by the United Fuel Gas Company, and *not* because it knew appellants would, or were expected to cease business upon the expiration of the franchise in 1947, as testified by the witness, Kimball.

The ownership of appellant by Columbia Gas and Electric Corporation, as well as subsidiary distributing companies, operating in Ohio, is so aptly referred to by the Supreme Court of Ohio in Columbus Gas and Fuel Company v. Public Utilities Commission, 127 O. S. 109, that we are

persuaded to quote as follows:

> BY THE COURT. "The outstanding fact which must first be stated as underlying and conditioning every element involved in this controversy, is as stated in the 1931 annual report of the Columbia Gas and Electric Corporation, that all of the properties involved in this case are 'thoroughly integrated and inter-connected, they constitute a single operating unit'."

This Court may take judicial notice that natural gas is available in Washington, D. C. The source of supply is West Virginia and Kentucky; that the inter-connected, interstate natural gas transmission systems, now in use, and being continually extended farther and farther into new territory, to replace artificial gas, is the best evidence that supplies of natural gas are not diminishing, but to the contrary, are increasing.

In Columbus Gas and Fuel Company v. Public Utilities Commission, supra, it is said:

> * * * "The gas business will continue so long as natural gas can be taken from the earth in the fields controlled by the parent corporation, in paying quantities. History along this line reveals the fact that the testimony of experts as to the probable life of natural gas is unreliable, and it is for this reason that amortization is guesswork. An allowance for amortization, such as contended for by the company would place an unwarranted burden upon the present consumers of gas. The stockholders of the gas company at no time had any right to anticipate that the law would, in addition to dividends, at some time, hand them back their original investment. The nature of the natural gas business, has been precarious at all times; but so long as it has continued to

function, its returns have been reasonably liberal.

Capital does not feel its way to an enterprise in this day and age. Investors investigate the vices and virtues of a proposition before investing. Public utilities, and natural gas companies in particular, advance the theory that they are public servants, furnishing the public with a perishable commodity; that their product is short lived; that when their product dies, they are left with an expensive property that cannot be utilized for other purposes; and that it is only fair, during the life of the company, that its investment should be returned to it by way of amortization.

That the product natural gas will eventually die, is self-evident. When it will die, is an assumption. An assumption is no stronger than the facts that support it, and it is just as fair to assume that much of the equipment now used, in the transportation and distribution of natural gas, will be utilized for the *transportation and distribution of artificial gas in the future*.

We must accredit to the men who organize and manage public utility corporations in which millions are invested, a higher degree of intelligence, and a keener foresight, than that of the ordinary individual. Hence to say, or even to think, that upon the failure of natural gas, the entire property of a natural gas company would be scrapped, would be a puny tribute to those responsible for its conduct."

Premises considered, these appellees believe that upon appellant's own testimony, they have shown that appellant is essentially a utility engaged in the purchase and distribution of natural gas and not a producer of natural gas, and that the life of its business is indeterminate, and not a utility of limited life. Appellant's gas business in Lexington, and for that matter, throughout Kentucky, may therefore, be likened to that of Los

Angeles Gas & Electric Company, decided by this Court, May, 1933, and to that of Wichita Gas Company, (2) Fed. Supp. 792, and to that of the Columbus Gas and Fuel Company, supra.

The Columbus Gas and Fuel Company is a subsidiary of Columbia Gas & Electric Corporation, as is the appellant here. The Columbus Company operates under an indeterminate franchise which, in effect, does appellant. In the cases cited, no claim was made for amortization of any part of the properties used for transmission and distribution of gas. It is true that in the Columbus case, because of the matter of establishing a fair "gate rate" for gas supplies furnished by subsidiaries of Columbia Gas and Electric Corporation, namely: Ohio Fuel Gas Company and United Fuel Gas Company, claim was made for the amortization and/or for depletion of gas lands and wells of the two last named corporations. Although the Public Service Commission of Ohio made allowances as claimed, the Supreme Court of Ohio held that the Commission had committed error.

The fact that Appellant is a part of the Columbia Gas and Electric Corporation system, should be given due consideration by the Court, respecting the matter of an adequate supply of gas being available for an indefinite period of time beyond the prediction of the "*engineer and accountant witness*" Mr. John T. Kimball, by applying the reasoning of Chief Justice Hughes, in Smith v. Illinois Bell Telephone Company, 282 U. S. 133:

"It is evident that in the present case we are not dealing with an ordinary *public utility company*, but with one that is part of a large system, one that is organized for the purpose of maintaining the credit of constituent companies and securing their efficient and economical management."

The franchise contract between appellant and the City of Lexington, (R. 51) provides that at all times, during the life of the franchise, appellant is to supply the City of Lexington and inhabitants with gas, either natural gas, mixed gas or manufactured gas, *but specifically, an adequate supply of natural gas*. The rates and charges are to be fixed and regulated by agreement, or, as provided in Section 201e-1, to 201e-20 inclusive of Kentucky Statutes (Railroad Commission Act.)" Thus, there is provided for an adequate supply of natural gas, or mixed or artificial gas and, as stated in appellant's main brief, page 3, upon terms and conditions that "were the result of advance agreement, between the city and the company, and was drawn to fit the situation and facts affecting appellant."

It is unthinkable that a community of the character, and with the population of Lexington, could or would, be willing to exist without gas service, and under the ownership of appellant, by the Columbia Gas & Electric Corporation, the supply of such gas service is assured for an indefinite period of time beyond the life of the existing franchise.

It should be called to the attention of the Court that the annual allowance of $60,263. made by the trial Court to

amortize appellant's owned, as well as leased property, that sum invested at 4% compound interest over a period of twenty years, would aggregate $1,794,516. In as much as the value of appellant's own property, allocated to the Lexington service, as fixed by the Court, is $1,586,880. appellant would receive that amount and yet have ownership of the property, as well as $207,636. on account of the allowance made to amortize property of the Lexington Utilities Company, to dispose of, and since, under the terms of the lease, between appellant and the Lexington Utilities Company, no provision respecting amortization exists, it is not unlikely that said amount would remain in the hands of appellant.

The sum of $60,263. approximates an assessment upon the 10,000 consumers of gas in Lexington of $6.00 per year, per consumer. In other words, the gas consumers of Lexington would be penalized $6.00 per year each, in order that appellant may have the value of the property owned and the property leased, returned to it, and yet retain ownership and control thereof.

RATE OF RETURN

Appellant's counsel, in their main brief (p. 55) under the heading of "Fair Return" failed to distinguish between a rate that is *confiscatory* and one that is *not fair*. Appellant presented to the Railroad Commission a demand for a 10% return. Appellant cites many cases among which may be found the majority, dating back years. Courts do not agree, and

commissions have been widely divergent in their views. In re Chesapeake & Potomac Telephone Company, Public Utilities Fortnightly of November 10, 1932, page 593, the Commission, facing all the hard facts of the present, said quoting from another opinion, that:

> "What is a fair return * * * can not be settled by invoking decisions of this court made years ago based upon conditions radically different from those which prevail today."

And that:

> "The problem is one to be tested primarily by present day conditions."

And further that:

> "This has reduced the purchasing power of individuals * * *. On the other hand, the dollars so paid to the purveyors will purchase more today than they would in the fairly recent past."

The Commission concluded that:

> "It is our decided opinion that, if rates are established which will enable the Company to earn a rate of return of not less than 6%, upon the rate base as herein determined, such rate of return will, under existing conditions, be entirely fair and reasonable."

At page 59 of appellant's main brief, counsel cited, Wichita Gas Co. v. Public Service Commission of Kansas, decided Jan. 5, 1933, (2) Fed. Supp. 792, but omit to cite the supplemental memorandum of Circuit Judges Phillips and McDermott at p. 799 where the two Judges found it necessary to re-state or rectify as to the rate of return on the fair value

of the utilities property.

In Kankakee Water Company v. Gilbert, et al., pending in U. S. District Court, for Eastern District of Illinois (report not available to us) the water company appealed on the ground of confiscation to the statutory Federal Court and this hearing was upon an application for a temporary injunction. Federal Court did not interfere and said this in respect to the rate of return:

> "(5) Under the existing generally depressed industrial and financial conditions, indicating a greatly abnormal condition both generally and locally, all of which appears in the record, we are not warranted in finding that the probable return of 5.17% upon the valuation as aforesaid furnished by the commission's prescribed rates is confiscatory. In this connection we have considered the evidence of present return in industrial enterprises of other character and that of similar utility companies as well as the fact that plaintiff makes no claim and furnishes no evidence that new capital is at present needed in this business."

Present conditions are not to be disregarded. The business depression which now exists, and of which the Court will take judicial notice, must affect the rate of return to be received by appellant. The past and present conditions have forced the rate of return to private business to lower and lower levels. It is now incumbent upon regulatory commissions and courts to bear in mind these facts and to give merited effect to them. This Court knows the depth of the present financial depression. The rich are already poor, and the poor are desperate. The call now, is for the primal necessities—food, clothing, shelter,

water, light and heat.

We respectfully submit that the Central Kentucky Natural Gas Company should thankfully accept a rate of return less than 7%, as compensatory in the instant case.

EXTRAORDINARY MAINTENANCE

The trial court (R. pp. 87-8.) in its opinion, made annual allowance as deductible by appellant each year as expense to determine income available for interest and dividends;

1. ($10,000.) per year for extraordinary maintenance of its own properties used in the service of the Lexington Kentucky district.

2. ($5,000.) per year for extraordinary maintenance of the Lexington Utilities Company's distribution system *leased by, and not owned by* the appellant. (see leasing contract printed in a separate pamphlet as an addendum to the (R. pages 267-273.)

Here again, Mr. Kimball, witness for appellant interjects a hypothesis for facts. The words, "extraordinary maintenance" used by him, is what is commonly denominated in the public utilities business as "Reserve for Depreciation," and by the Railroad Commission of California in the Los Angeles case recently decided by this Court, as "Depreciation Annuity."

Such a reserve is created for the purpose of renewing and replacing physical depreciable property which is no longer useful because of decrepitude or obsolescence to a state that would not warrant repairs and therefore should be

replaced or renewed. The amount set aside monthly or annually for that purpose is determined by the experience of the utility over a period of years sufficient to enable it to approximate as nearly as may be the amount that should be set aside for that purpose. Such accruals are charged to current operating expense. When a replacement or renewal of physical depreciable property is made, the original cost of such property is charged to the reserve; and any excess cost of such renewal or replacements is charged to capital. This is the course pursued by prudently managed utilities and the books of account should reflect that method clearly and distinctly. The witness Kimball, however, prefers, and does in his testimony, (R. 223.) (Mss. 9) (R [illegible].) resort to the experience of other and larger companies distributing natural gas, such as, the East Ohio of Cleveland and the Logan Gas Company of Ohio—now the Ohio Fuel Gas Company—and also, the Hope Natural Gas Company. He does not show the experience of appellant with respect to the amount expended over a reasonable period of years for renewals and replacements. The reason is obvious. When consideration is given to his testimony (Mss. 9.) where he generalizes "rather expensive replacements of the parts worn out" but fails to specify; and "occasionally the rubber on the couplings which joins the two pipes together must be replaced, that they rot out, and in so doing that the pipes have to be dug up, and that this entails an enormous expenditure, and the couplings have to be kept tight; and the *expenses have to include an*

allowance to cover that sort of replacement work."

Under section 9 of the franchise, appellant agrees to conform its accounting to a uniform classification of accounts prescribed for natural gas utilities by the State Commissions of West Virginia, Ohio and Pennsylvania or either of them. This classification of accounts has been in general use by natural gas companies for many years and it may be assumed that Mr. Kimball was thoroughly conversant therewith; and did know that all of the items mentioned by him are classified under said classification as "Current Operating Expense," to be charged out as such, when incurred.

Inasmuch as the witness failed to show the experience of the company and the necessity under said experience, for an allowance as extraordinary maintenance, it is obvious that the books of account of appellant, do not reflect any charges for renewals or replacements elsewhere than in current operating expense. The conclusion therefore, is inevitable, that appellant charges all repairs, renewals and replacements as current operating expense. Therefore, an additional allowance as claimed under this head would result in a double allowance namely, in that the items having already been charged into operating expense should not again be considered. Appellant having failed to meet the burden of proof, we respectfully submit that the allowance made by the trial Court should be set aside.

IS THE 45c PER M. CU. FT. OF GAS FIXED BY THE RAILROAD COMMISSION OF KENTUCKY, CONFISCATORY?

The mean net operating revenue, available for amortization, depletion, extraordinary maintenance, contingencies, interest and dividends (R. 116a.) last two columns, for the year ended 1926, at a 40c rate, and at a 50c rate, is $237,243. Deducting $75,263. (R. 87, 88.) allowed by the trial court, for amortization and extraordinary maintenance, leaves $161,980, for return on the trial Court's rate base, (R. 84, 85.) of $2,198,107, yields a return of 7.36%. If the Court should adopt these appellees' suggestion, that the rate base of the Lexington Utilities Company property should be $500,000. in place of $611,257. included in the trial Court's rate base (R. 84, 85.) then a revised rate base of $2,086,880. would result and the $161,980. hereinabove set forth, would yield a return of 7.7%.

If this Court should adopt these appellees' suggestion that the allowance for amortization and extraordinary maintenance, made by the trial Court, (R. 87, 88.) in the sum of $75,263. should be disallowed, that sum would be added to the $161,980. net return hereinabove referred to, and thus produce net earnings of $237,243. which equals a return of approximately 10.8% on the rate base fixed by the Court.

CONCLUSION

These appellees summit the following:

1.—That the Court, under the caption Rate Base should disallow the item Cost of Financing and reduce the item of $26,650. Organization Expense and substitute therefor, the amount of $6,993. and should fix the rate base of the Lexington Utilities property, leased by appellant, at not more than $500,000. and that the rate base applicable to Lexington shall not exceed $2,086,880.

2.—That the sum of $60,263. to amortize the property of appellant, owned and leased, fixed by the trial Court, be disallowed.

3.—That the $15,000. fixed by the trial Court, for Extraordinary Maintenance of appellants, owned and leased property, be disallowed.

It is respectfully urged that the Court affirm the decree of the District Court of the United States, Eastern District of Kentucky, refusing to enjoin the award of the Railroad Commission of Kentucky, and to make such further orders as may be necessary to enable that Court to properly dispose of the funds impounded under its order.

We submit the case.

Respectfully,

Maurice H. Thatcher,
Joseph A. Edge,
John H. Connaughton,
Raymond M. Hudson.

Attorneys for Appellees,
Mrs. George Hignight, et al.

November 4, 1933.

SUPPLEMENT TO APPELLEES' FOREGOING BRIEF.

The case has been fairly well stated in the brief for the appellant and appellees, but it will be noted from an examination of the record that a vast amount of the testimony in the lower court and in the Railroad Commission was omitted from the record as brought to this Court, and it is admitted in the brief of appellant (p. 81) that a large amount of the testimony given on that page is omitted, and it is referred to in the City of Lexington brief (pp. 108-10).

It will also be noted that the Court discussed and made findings as to 40c gas and 50c gas, but none as to the rate fixed by the Railroad Commission—45c gas.

The appellant accepts and does not complain of the valuation of its property at $2,198,107.00 as fixed by the Court. (R. 98, Appellant's brief p. 12.) It does not question the amount of income as found by the Court, but does contend that the income found by the Court, on the value that the appellant accepts, as confiscatory.

BRIEF.

When an Appellant omits evidence heard in the lower court it will be presumed that the same justified the decree.

The decree of the lower court is always presumed to be right till the appellant shows from the record that is is erroneous, and when the appellant deliberately leaves out vast quantities of textimony, it is conclusively presumed that such evidence would jutisfy the decree, and this Court cannot reverse a decree under such circumstances.

The findings and opinion of the Court show that the income available for interest and dividends on the 50c rate for 1926 was a fraction less than ten per cent and for 1927 it was substantially seven per cent (a fraction less than seven per cent) which would make the return for average years approximately eight and one-half per cent.

The Court found that the income available for interest and dividends at the 40c rate, from 1922 to 1926, inclusive was slightly less than six per cent, and that the return for 1926, at 50c, was approximately ten per cent, and for 1927, it was substantially seven per cent, one being a mild year and the other a cold year, under the decision in *Los Angeles Gas and Electric Company vs. Railroad Commission*, 299 U. S. 287; 77 L. Ed. 820, at 829 and 837, the average return would be approximately eight and one-half per cent.

If, as found by the Court, the 40c rate produced a little less than six per cent and the 50c rate produced approximately eight and one-half per cent, then the 45c rate fixed by the Railroad Commission would necessarily produce a fraction over seven per cent: This is a necessary conclusion and deduction from the findings and opinion in the lower court.

The lower court based its finding of substantially seven per cent on the one mild year of 1927, and held that it was not confiscatory, but a fair and reasonable return. When, if it had followed the principle since announced in the Los Angeles case, it would have had to take the average year, and it would have had to find, and the necessary conclusion is that it did find, that the 45c rate was fair and reasonable. It found what the facts were, but it applied the wrong principle of law to the facts found in reaching its conclusions. Therefore, as a necessary legal conclusion, it did find, in fact and in law, that the 45c rate would have produced and did produce a little over seven per cent.

A six per cent return on Gas Properties such as is involved in this suit is fair, reasonable and adequate.

This Court has so often held that a six per cent return is sufficient for gas companies, that it seems strange the appellant should contend that seven or seven and one-half per cent is confiscatory. This Court held a six per cent rate is sufficient in three gas cases: They are *Willcox vs. Consolidated Gas Company,* 212 U. S. 19; 53 L. Ed. 382; *Cedar Rapids Gas Light Company vs. Cedar Rapids,* 223 U. S. 655; 56 L. Ed. 594; *Des Moines Gas Company vs. Des Moines,* 238 U. S. 163; 59 L. Ed. 1244.

In *Pacific Gas and Electric Co. vs. San Francisco,* 265 U. S. 403; 68 L. Ed. 1075, the court approved a seven per cent return, and in the *Georgia Railway and Power Co. vs. Railroad Commission,* 262 U. S. 625; 67 L. Ed. 1144, this Court held seven and one-fourth per cent in the gas industry was non-confiscatory, and in *McCardle vs. Indianpolis Water Company,* 272 U. S. 400, that seven per cent was a reasonable return.

The Railroad Commission did not make findings of fact, as under the Statute it was not required to, and it followed the procedure approved by this Court in Wichita Railroad and Light Company Case, 260 U. S. 48.

Certainly, we would submit, that in this grave period of financial turmoil and stress, when nearly every private business enterprise in the country is either "in the red" or in near that condition and unable to make profits, a public utility company, operating under franchise privileges, and whose position is exclusive or monopolistic in effect, and making as the record in this case shows, from seven to ten per cent net on its investment, it should be content with this return, which we earnestly urge under the decision is adequate remunerative and just.

It seems that the decision in the Los Angeles case above justifies, and demands, the sustaining of the Railroad Commission's rate of 45c which would yield an average return

of seven per cent over the period covered by the record; it is presumed reasonable "unless confiscation is clearly established," id. 75 L. Ed. 26, 829, and also by *United Fuel Gas Co. vs. P. U. Commission*, 278 U. S. 300.

CAN THE COURT FIX A RATE?

If this Court should be of the opinion and hold that the lower court exceeded its jurisdiction when it undertook to fix a rate of 50c in lieu of the 45c rate fixed by the Railroad Commission, which later is adequate, as shown by the record, and was not enjoined, then we would respectfully suggest that this Court should modify the lower court decree, to the extent of declaring the fixing of the 50c rate void, and otherwise sustain and affirm the decree and uphold the Railroad Commission rate of 45c.

The Court found as a fact that a 40c rate over average years produced slightly less than 6 per cent, and that a 50c rate over average years produced slightly less than eight and one-half per cent, then by a simple mathematical calculation a 45c rate produced slightly over seven per cent, which this Court and the lower court have both held is not confiscatory, but is reasonable and sufficient; therefore, the decree can be readily modified without any further proceedings. See Los Angeles case above, and *Federal Radio Commission vs. Nelson Railway B & M Co.*, 289 U. S. 266; 77, L. Ed. 608, *Federal Radio Commission vs. General Electric Co.*, 281 U. S. 464, 77, 74 L. Ed. 969, 970.

Therefore these appelles submit that the final decree should be modified, as above, and as modified, affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 11.—October Term, 1933.

Central Kentucky Natural Gas Company, Appellant, *vs.* Railroad Commission of Kentucky, Moses R. Glenn, Oscar Vest and James Hatcher, Members Constituting said Railroad Commission, et al.	Appeal from the District Court of the United States for the Eastern District of Kentucky.

[December 4, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

This is a suit in equity, brought by appellant, a Kentucky corporation, in the District Court for Eastern Kentucky, against the state Railroad Commission, certain state officers, and the City of Lexington, to set aside as confiscatory a rate prescribed by the Commission for the sale of natural gas distributed by appellant through its pipe lines to consumers in Lexington. The district court, of three judges, found the rate confiscatory, but refused to enjoin it because of the failure of the appellant to conform to a condition prescribed by the court as prerequisite to granting the injunction. — Fed. Supp. —. From this decree the present appeal was taken under § 380 of the Judicial Code, 28 U. S. C. A., § 266.

In 1905 the appellant had secured a twenty-year franchise for the distribution of natural gas to consumers through its pipe lines in the City of Lexington. After the expiration of the franchise on September 5, 1925, and pursuant to ordinance of the City of Lexington of January 28, 1927, the appellant became the purchaser, at public sale, of a new franchise to distribute natural gas to consumers in Lexington, upon the terms and conditions of a written contract between appellant and the city, which was incorporated in the ordinance and became effective on its acceptance by the city by ordinance of February 25, 1927.

The rate to be charged to consumers for gas was not fixed by the franchise contract. It stipulated that the gas supplied by appellant should be at just and reasonable rates, but it provided

that, in the first instance, the rates should be designated by appellant in writing, by a rate schedule, filed with the mayor of the city and the Railroad Commission, and that if the city should consider the scheduled rates in excess of just and reasonable rates, it should, within a time specified, institute proceedings before the Railroad Commission to have a just and reasonable rate found and prescribed by it in accordance with the applicable statutes of the State. It was also agreed by the franchise contract that pending proceedings before the Commission and "subsequent proceedings in court", for the determination of a just and reasonable rate, the appellant should charge its patrons a temporary rate of 50¢ per thousand feet for gas consumed until such time as it should furnish certain increased pipe line service, required by the franchise, after which, and during the proceedings for fixing the rate, the temporary rate should be increased to 60¢ per thousand feet; that pending such proceedings 10¢ of the rate collected from customers, whether 50¢ or 60¢, should be impounded under the direction of the Commission and that at their conclusion "the Commission or the court" should distribute the impounded fund in accordance with the respective interests in it of appellant and its consumers.

Acting under the provisions of the franchise contract, appellant promulgated a schedule of rates on February 26, 1927, whereupon the city, on March 25, 1927, lodged a complaint with the Railroad Commission assailing the scheduled rates as excessive, and asked that it establish a just and reasonable rate. The Commission directed that 10¢ of the temporary rate collected by appellants from consumers should be impounded with a custodian, appointed by the Commission, to receive and hold it pending final determination of the rate. In December, 1927, while the proceeding before the Commission was pending, the additional pipe line service required by the franchise was brought into operation and the prescribed temporary rate of 60¢ per thousand was established. Hearings were had and the proceedings continued before the Commission, which resulted in its order of October 9, 1929, assailed here, which fixed 45¢ per thousand as a just and reasonable rate and directed appropriate preliminary steps for the distribution of the impounded fund.

The bill in the present suit assails the 45¢ rate as confiscatory and hence an infringement of appellant's immunity under the

Fourteenth Amendment, and contains allegations showing that appellant will be irreparably injured if the rate becomes effective. It prays that the respondents be restrained from carrying out the order of the Commission, and asks payment over to appellant of the impounded fund. The district court, by interlocutory injunction, enjoined any further proceedings under the order, and appointed as receiver the custodian of the fund impounded by direction of the Commission, to receive and hold, subject to the further order of the court, any fund required to be impounded by the franchise contract subsequent to the order of the Commission, and directed appellant, pending the final decree, to pay over to the receiver 10¢ of the 60¢ rate which it should collect from its patrons.

After a hearing and consideration of the evidence, the court found that the 45¢ rate was confiscatory, that a rate of 50¢ would be just and reasonable, and directed that a permanent injunction issue restraining the imposition of the 45¢ rate, but upon the condition that appellant file with the court its consent that the fund impounded from the rate collected in excess of 50¢ per thousand be distributed to such of its patrons as were entitled to share in it, and that it file with the Railroad Commission and with the Fayette Circuit Court of Kentucky its written consent that those tribunals make like orders of distribution of all funds in excess of the 50¢ rate which had been impounded and held by their orders. As appellant declined to consent to such distribution of the funds, final decree was entered denying the prayer for a permanent injunction, and directing that the fund impounded with the receiver be distributed among the consumers in proportion to their respective contributions to it.

From this decree appellant alone has appealed. While relying on the findings of the court below that the 45¢ rate is confiscatory, it challenges the finding that the 50¢ rate is just and reasonable, and upon that ground assails the provision of the decree directing distribution to the consumers of the impounded funds made up of collections in excess of the 50¢ rate. It also attacks the denial of a permanent injunction because of appellant's refusal to assent to the distribution of the impounded funds on the basis of that rate. Respondents, while resisting each of these contentions, seek also to sustain the decree denying the injunction on the ground that the 45¢ rate is not confiscatory. See *Langnes* v. *Green*, 282 U. S. 531; *United States* v. *American Railway Express Co.*, 265 U. S. 425.

1. There being no diversity of citizenship of the parties to the litigation, the jurisdiction of the district court to enjoin the 45¢ rate prescribed by the Commission is dependent wholly upon the allegations in the bill that the rate assailed was one prescribed by state authority and violates the Fourteenth Amendment because confiscatory. If the rate were fixed by agreement of the parties disclosed by the franchise contract exhibited in the bill, or if it were fixed by the Commission, acting as an arbitrator pursuant to agreement of the parties thus deriving its authority from the contract, it is plain that no federal question would be presented. *Georgia Railway Co.* v. *Decatur*, 262 U. S. 432, 438; *Columbus Ry. & Power Co.* v. *Columbus*, 249 U. S. 399.

But the 45¢ rate was not one prescribed by the contract. By its terms the only effect of the contract upon rates, other than the temporary rates in force pending the proceedings before the Commission, was to allow the appellant to promulgate a schedule of rates which were to be effective unless, within a time specified, the city should proceed under the laws of the state to have a rate prescribed by public authority. By §§ 201e-2, 201e-5, 201e-11, 201e-14 of the Kentucky statutes the Railroad Commission is clothed with the authority of the state to fix rates for the distribution of natural gas by public service companies and is required, upon complaint, to fix just and reasonable rates. It derived its power to fix the rate in the present case, not from the agreement of the parties to this litigation, but from the state legislature. It was that power which the city called into action by its complaint to the Commission that the rates designated in appellant's rate schedule were excessive. The rate, being prescribed by state authority, was, if confiscatory, an infringement of constitutional limitations. The case made by the bill was, therefore, within the jurisdiction of the court below, and called for its determination of the constitutional issue presented.

2. While the jurisdiction of the court was invoked to enjoin the rate because confiscatory, it nevertheless denied any relief from the imposition of the 45¢ rate which it had found to be confiscatory, and directed the return to appellant's patrons of the fund impounded from the collections made in excess of the 50¢ rate. The basis of this action was the finding by the court that the 50¢ rate was just and reasonable, from which it concluded that the appellant was not entitled to retain any amounts collected from its

consumers in excess of that rate, and that the court might, in its discretion, deny any equitable relief since the appellant itself had refused to do equity by consenting to the rate which the court deemed just and reasonable.

The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State Railroad Tax Cases*, 92 U. S. 575; *Cummings* v. *National Bank*, 101 U. S. 153; *Peoples National Bank* v. *Marye*, 191 U. S. 272, 287; see *Norwood* v. *Baker*, 172 U. S. 269, 294. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such substituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey* v. *McDonald*, 109 U. S. 150, 157, or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231, 273; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165.

There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton* v. *Consolidated Gas Co., supra; Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 397; *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282; cf. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *O'Donoghue* v. *United States*, 289 U. S. 516.

This Court has warned that the power to attach conditions to decrees enjoining state rates should be cautiously exercised. *Newton* v. *Consolidated Gas Co., supra*, 175. The practical effect of a denial of relief unless the plaintiff will submit to a rate, the

reasonableness of which he challenges, is to make the surrender of the right to invoke a distinctively state legislative function the price of justice in the federal courts. The practice would tend to curtail the exercise of that function by action of a court which is itself without authority either to exercise it or to prevent the state from doing so. Such interference with the legislative function is not a proper exercise of the discretionary powers of a federal court of equity. See *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, *supra*.

Such a condition, too, is different from the requirement that a plaintiff shall pay a tax, the amount of which is known and conceded to be due, as a condition of enjoining an excessive tax. In *Norwood* v. *Baker*, *supra*, 291, 294, this Court pointed out that it would be improper, as a condition of enjoining an unconstitutional special assessment levied by a state authority, to require the plaintiff to tender the amount of such assessment as the court should consider might lawfully be made by state action not yet taken. In *Newton* v. *Consolidated Gas Company*, *supra*, where the legislature was not in session and had not delegated its power to fix rates, the court sustained a decree enjoining a rate as confiscatory on condition that the plaintiff should impound the rate collected in excess of the confiscatory rate until a specified date, after the assembly of the legislature, or until a new rate should be fixed by state authority. But the condition was approved on the ground that its practical effect was to preserve the rights of the parties pending the appeal.

Here the rate-making body, the Railroad Commission, is free to perform its function of fixing a just and reasonable rate as soon as the confiscatory rate is enjoined. The rights of the parties are fully protected both by the provision of the franchise contract and the order of the Commission in the proceedings brought to fix the rate, not yet terminated, requiring collections by appellant in excess of the 50¢ rate to be impounded with the custodian. The condition imposed here was not calculated to protect the rights of the parties pending an appeal or further action by the rate-making body. Compliance with it would have involved the surrender of rights asserted by appellant to the funds impounded during a period of more than five years. It would have made impossible any court review of the condition, by appeal or otherwise.

In the circumstances there was no occasion for the court to draw upon its extraordinary equity powers to attach any con-

dition to its decree, and the condition which it did attach was an unwarranted intrusion on the powers of the Commission. On the basis of its conclusion that the 45¢ rate was confiscatory, it should have granted appropriate relief, without condition, leaving the Commission free to exercise its authority to fix a reasonable rate, and it should have relinquished its control over the impounded fund by directing the receiver to retain it, not as receiver, but in his capacity as custodian appointed by the Commission, to await its action in fixing a lawful rate.

3. The court below based its conclusion that the 45¢ rate was confiscatory and that the 50¢ rate would be just and reasonable upon a valuation of the property included in the rate base as of December 31, 1926, a date shortly preceding the effective date of the franchise, which was February 25, 1927. In choosing this date for establishing the rate base the court acted upon consent of the parties, which it interpreted as requiring it to make as of that date all findings and determinations having a bearing upon the effect of the 45¢ rate and the reasonableness of the 50¢ rate. Although the case was not ready for final decree until September, 1932, and the decree, like the Commission's order, spoke for the future as well as for the past, the findings upon which it rested were thus restricted to the date which, for all practical purposes, may be treated as the effective date of the franchise.

In making the findings as of December 31, 1926, the court considered evidence, tending to support them, of earnings and other relevant data during a number of years preceding that date and the year following. In that year the temporary 50¢ rate was in force until December, and until that time no substantial change was shown in the conditions affecting the propriety of the rate fixed by the Commission from those prevailing on December 31, 1926. But by December, 1927, the additional pipe line service which, by the franchise, appellant was required to furnish, had been brought into operation and the agreed temporary rate of 60¢ was established. Before that date the rates paid by appellant for gas purchased for its service from producers had ranged from 10¢ to 20¢ per thousand feet. But the additional pipe line service was procured by contract with another company by which appellant agreed to purchase annually 750 million feet of gas at 40¢ per thousand. As the court considered itself restricted to findings as of December, 1926, it declined to take into account the effect of the increased cost of gas under this contract in making findings

as to the propriety of the Commission's rate. That restriction also necessarily excluded from consideration the profound changes in values, costs of service, consumption of commodities and reasonable return on invested capital which we judicially know took place during the period of more than five years while the case was pending before the Commission and the court. See *Atchison, Topeka and Santa Fe Ry.* v. *United States,* 284 U. S. 248.

It is apparent that any decree, to be entered here, upon findings so restricted, must be similarly restricted in its operation and should speak of the validity of the Commission's rate only as of a time approximating the date when the franchise became effective. Respondents assail the court's findings that the 45¢ rate was confiscatory and that the 50¢ rate was reasonable, and its findings of value and of the amount to be allowed as a deduction from gross revenue for amortization of the appellant's plants. So far as these objections and others are addressed to the weight of the evidence, we are satisfied that the evidence supports the findings as restricted in the manner already indicated. In view of the limited effect which must be given to any decree to be entered, we have no occasion to consider these objections in any other aspect.

The decree will be reversed and the cause remanded, with instructions to enter a decree enjoining so much of the Commission's order as fixes the rate to be charged for gas distributed by appellant to consumers, and relinquishing any further control by the court or its receiver over the impounded fund in his hands by directing that he shall continue to hold such fund, not as receiver, but in his capacity as custodian for the Railroad Commission. The decree will state that it is without prejudice to the right and power of the Commission to fix a just and reasonable rate, and that it makes no adjudication of the validity of the 45¢ rate fixed by the Commission, so far as it may be affected by changed conditions after February 25, 1927, the effective date of appellant's franchise. Costs, other than in this Court, will be awarded in the discretion of the court below.

Reversed.

Mr. Justice SUTHERLAND took no part in the consideration or decision of this case.